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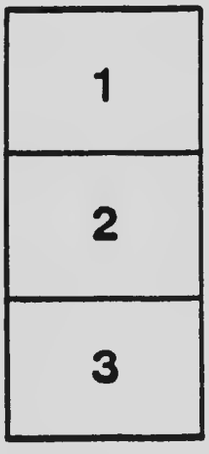

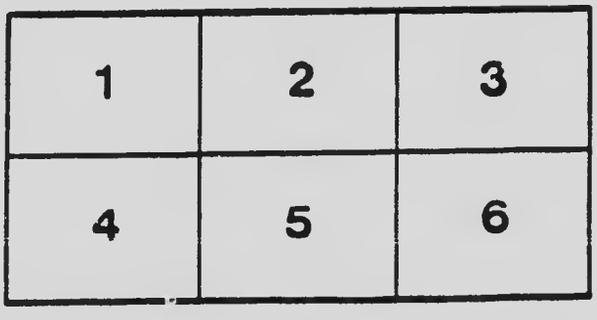

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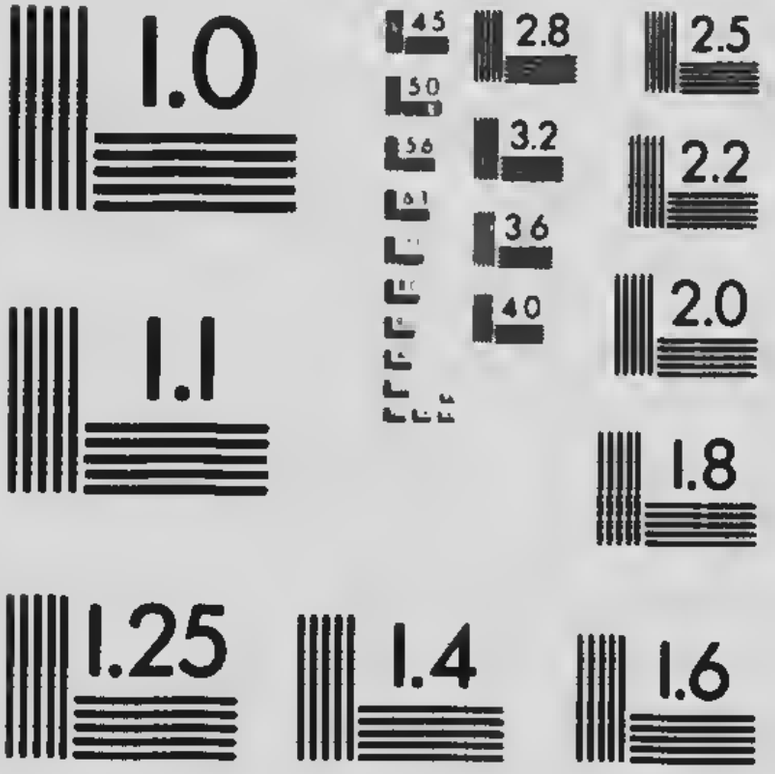

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FEDERATIONS AND UNIONS WITHIN THE BRITISH EMPIRE

BY

HUGH EDWARD EGERTON

BEIT PROFESSOR OF COLONIAL HISTORY
FELLOW OF ALL SOULS COLLEGE, OXFORD

OXFORD
AT THE CLARENDON PRESS
1911

160547

HENRY FROWDE, M.A.
PUBLISHER TO THE UNIVERSITY OF OXFORD
LONDON, EDINBURGH, NEW YORK
TORONTO AND MELBOURNE

PREFACE

The time was, we are told, when a knowledge of the laws of his country was a part of the liberal education of an English gentleman. The great mass and confusion of the Statutes at large have long made this impossible; and a commission in the Guards is often the modern substitute for attendance at one of the Inns of Court, in the case of a future country magistrate. But an exception to the rule that confines the knowledge of Acts of Parliament to the trained lawyer may well be made, when the Statutes are in question, which embody (to a great extent at least) the political Constitutions which have been evolved by the needs of the peoples of Canada, Australia and South Africa. At a time when our own unwritten Constitution is in the melting-pot, it is surely a matter of importance that we should know the exact significance of the precedents which, with a light heart, our self-constituted political guides quote to us from their respective platforms.

'So, do I find example, rule of life;
So, square and set in order the new page.'

An apology is, then, perhaps scarcely needed for putting together in a handy form these 'fundamental Constitutions', together with some other documents which may assist in their elucidation, introduced by an historical account of the circumstances in which they rose. To the professed lawyer and historian

a book of this kind may appear a hybrid, possessing the weak points of either of its parent stocks: but, on the other hand, it may be hoped that the end justifies the means.

I have advisedly not included the Constitution of New Zealand. The shadowy kind of federation adumbrated by the establishment of the six Provinces can hardly take rank among federal Governments, even during the short period of the existence of these Provinces; and in other respects the Constitution of New Zealand was similar to the Constitutions of the other Australasian Colonies.

I have to express my warm thanks for corrections and advice to Professor W. L. Grant, of Queen's University, Kingston; to Mr. A. Berriedale Keith, of the Colonial office, author of *Responsible Government in the Dominions*, and to Mr. E. Barker, Fellow and Tutor of St. John's College, Oxford. Professor Grant found time before leaving England to read the book through in MS.; Mr. Keith has generously placed at my disposal his probably unrivalled knowledge, at least in this country, of these Statutes, and Mr. Barker read my Introduction, and made some valuable suggestions with regard to its concluding part.

H. E. EGERTON.

OXFORD
January, 1911.

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INTRODUCTION

WHATEVER be the ultimate future of the British Empire as a whole, we may safely affirm that, with the accomplishment of South African union, the great oversea dominions have, so far as the main principles of their Constitutions are concerned, reached their final stage of development. It is possible, though past experience forbids us to prophesy, that Newfoundland may throw in its lot with the Dominion of Canada. It is possible, though extremely improbable, that at some future date New Zealand may become part of an Australasian Commonwealth. It is practically certain that before very long Rhodesia will be part and parcel of the South African Union. But such changes, important as they would be, would not greatly modify the general lines of Canadian, Australian, and South African constitutional development.

The moment then seems convenient to put together in a handy volume the three Statutes which explain the working of the federal and unifying principle within portions of the British Empire. A few other documents have been added containing attempts at federation made at an earlier date by Colonial and English statesmen, and some notes have been appended to illustrate the text. When it is remembered, however, that Mr. Wheeler's elaborate commentary on the *Confederation Law of Canada* contains over eleven hundred pages, and that the *Annotated Constitution of the Australian Commonwealth* by Quick and Garran contains over a thousand, the need for compression will become at once apparent.

Before approaching the Acts themselves, it is necessary

to know a little of the historical background of which they were the logical outcome. Why is Canada organized under one form of federation, and Australia under another? And why has South Africa preferred a union to a federation? The answer to these questions lies in their past history, so that some kind of historical introduction is indispensable: although it will no doubt seem elementary enough to those familiar with the facts.

Before, however, entering upon the history it is necessary to define what is meant by a Federation. A federal form of government is found where communities, which possess for certain purposes a distinct political existence, join together to form a common whole, without losing their separate organization. The component parts of a federal system must, in the words of Professor Dicey 'desire union but must not desire unity.' A federal government need not be contained in a written constitution; but, inasmuch as it is in the nature of a treaty between different parties, the inconvenience of its not being under writing is obvious. The most perfect form of federation is when the executive, the legislative, and the judicial powers find expression in both the central and the local governments: but federations are often based on less systematic lines.

New England Confederation of 1643.

The only example of a kind of federation under the old Colonial system, with the exception of the short-lived federal union of the Leeward Islands in the West Indies, is that of the United Colonies of New England, set on foot in 1643. Although the principle of town self-government played a leading part in the foundation of New England, the General Court of Massachusetts as a whole was able to maintain effective control over the various settlements. The authority of the general government had been recognized at Salem, and when Boston, Rochester, Water-

town and the rest were founded, their inhabitants had no intention of setting up independent communities. When, however, settlements were made in Connecticut and at New Haven, outside the Massachusetts jurisdictic it was impossible to keep these within the bonnds of that Colony. Rhode Island and Providence Plantation could be dismissed from the mind, as being contumacious, heretical communities, not having that union of thought regarding Church questions which was the strongest, indeed the one, civic bond in New England corporate life. The settlements in New Hampshire and Maine were at too embryonic a stage to become members of a confederation. But with regard to the other New England Colonies, Plymouth, the first Puritan settlement in Americа, the eminently respectable home of the Pilgrim Fathers, and Massachusetts, with its orthodox offshoots Connecticut and New Haven, might not some form of federation be formed to supply common needs?

Connecticut, taught wisdom during its struggle with the Pequot Indians, made application to Massachusetts as early as 1637: but, though the proposal was more than once put forward, it got entangled in disputes over boundary questions, so that nothing effective was done till in 1643 the form of federation here set out was agreed upon. The kind of confederation was of a feeble character, there being no means by which the decisions of the federal authority could be enforced upon recalcitrant individuals. If, in the words of John Quincy Adams, 'the New England Confederacy of 1643 was the model and prototype of the North American Confederacy of 1774,' all that can be said is that it was no wonder that the latter proved so inefficient in accomplishing the ends of government. Moreover, the circumstances of the component parts were so different as to make the equality established between them obviously unfair. Massachusetts had only two Commissioners assigned to it out of a total of eight: whilst, inasmuch as the ratio

of contribution was by population, and Massachusetts had some fifteen thousand out of a total population of some twenty-three thousand, it would be liable to contribute much more than was contributed by the other three members combined. In 1648 Massachusetts demanded an additional Commissioner and complained of assessment by mere population, on the ground that she had an undue proportion of poor labourers and artificers. With this sense of injustice rankling, it was natural that Massachusetts, from the first, treated with little respect the decisions of the Commissioners. When they decided against her in 1647, in a contest between her and Connecticut, regarding the legality of duties imposed by the Connecticut General Court at Saybrook on the Connecticut River, she only yielded to the authority of the Commissioners with extreme reluctance. Just before the Confederation was established its need was shown by the action of the Boston authorities in encouraging the private expedition by the Frenchman De la Tour against his rival D'Aulnay, the French Governor of Acadia. With the establishment of the Confederation, the question of a treaty of commerce between the French and Massachusetts was referred to the Commissioners for their decision. They were in favour of such a treaty; but when it appeared later (in 1651) that the French expected as a *quid pro quo* an alliance, offensive and defensive, against the Mohawk Indians, they wisely refused to embark in a controversy the justice of which they had no means of understanding. A different decision might have completely altered the whole course of the future history. On one important question of foreign policy the Commissioners were clearly in the wrong and Massachusetts in the right; though the manner in which the latter enforced its opinion strained to the breaking-point a federal tie already weak. There had been constant disputes as to boundaries between Connecticut and New Netherland, partly settled by arbitration in 1650; and when war broke out in Europe between

England and the United Provinces in 1652, the Federal Commissioners determined to carry it on in America; but the Massachusetts General Court steadily refused to be bound by the decision of the six Commissioners from the other Colonies. Their action was no doubt right upon the merits; none the less it was a direct defiance of the federal authority. The contention of Massachusetts was that the Commissioners had not power to determine the justice of an *offensive* war, so as to oblige the several Colonies to act accordingly; and, whatever be thought of their interpretation of the actual language, the fact that the Commissioners could not execute their own orders or provide the necessary revenue made the consent of Massachusetts a practical necessity. Although Massachusetts succeeded in her object, she afterwards admitted that her interpretation of the article could not be sustained. In 1667, however, a new clause was introduced providing that the power of determining the question of an offensive war should rest with the several General Courts, and not with the Commissioners, without special instructions from their respective General Courts. A more serious blow, however, and one from which it never really recovered, was given to the Confederation when, in cynical disregard of the express terms of one of its articles, Connecticut obtained the inclusion of New Haven in its charter signed in 1662. New Haven resented bitterly the action of Connecticut: and only yielded in 1664, when the prospect of a still worse fate, that of becoming absorbed in the new province of the Duke of York, loomed on the horizon. In any case, with the fate of New Haven present before men's eyes, the year of New England federation had lost, if it ever possessed, its spring. A feeble protest was made by the Commissioners in September, 1663: but they were powerless against accomplished facts. It was no wonder that in 1665 Plymouth proposed the dissolution of the confederacy.

Annual sessions, which had hitherto been held regularly, ceased after 1664. The disappearance of New Haven was followed by an order declaring that the Commissioners would only meet triennially; and, in 1670, certain alterations were proposed in the articles, which were ratified in 1672. In the articles as proposed in 1670, the quotas to be furnished by Massachusetts, Plymouth, and Connecticut were respectively 100, 45, and 90. As finally settled, they were 100, 30, and 60. After the outbreak of Philip's War in 1675, several meetings were held and forces raised by the Commissioners, but after the Indians had been finally subdued their period of activity came to an end: and, with the revocation of the Massachusetts charter in 1684, the New England Confederation became a thing of the past.

But, though the Confederation of the United Colonies never played a conspicuous part in the political field, owing partly to its inherent weakness, partly to the overwhelming superiority of Massachusetts and the general prevalence of particularist tendencies, still in more modest ways it accomplished good work. The Commissioners busied themselves on behalf of education and of missionary enterprise. It was owing to their action that special efforts were made on behalf of Harvard College, 'that school of the prophets,' by the Massachusetts and Connecticut General Courts: and the Commissioners seem to have been generally regarded as the natural pillars of New England orthodoxy. When, in 1649, the Society for the Propagation of the Gospel was set on foot in England, the Commissioners of the United Colonies were made the conduit pipe by which the funds should be administered. It is noteworthy that although, so far as the English Government was concerned, the establishment of the Confederation had been a wholly unauthorized proceeding, yet after the Stuart restoration no change was made in this respect. The joint efforts of the Society in England and of the Commissioners in New

England in the work of converting and civilizing the Indians continued, until they were brought to a sudden end by the catastrophe of Philip's War.

Penn's Proposal.[1]

We have seen that the New England Confederation was a purely American affair, resolved upon and carried through without any consultation of the Home Government. But, as the English authorities, upon the whole, strengthened their hold upon the Colonies, and as the danger of French aggression in America grew year by year greater, it became the rôle of the Home Government to urge some form of union, and that of the jealous and short-sighted Colonies, each developing in its own way a separate provincial life, to brush aside such advice with suspicion and distrust. The way out of the difficulty attempted by James II need not detain us. To add government to government, and lump the whole under a single autocrat, was one method of union; but it was a method deeply repugnant to all that was best in the temper of Englishmen, whether at home or abroad, and one not at all suited to American soil. None the less the mischief against which James's brutal statesmanship was directed was a real one, and it is interesting to observe that two of the ablest men who were connected with the American Colonies put forward plans for meeting the mischief. That of Penn, inasmuch as it remained without any consequences, need not detain us. It was, from his own point of view, no doubt a purely opportunist proposal. The system attempted by the Board of Trade of settling the quotas of men to be furnished for purposes of defence by the various Colonies had broken down in

[1] A scheme very similar to Penn's was suggested in the Introduction to Daniel Coxe's *Description of Carolana*, 1722. Coxe was an indefatigable but unlucky empire builder, on paper, whose claims bulk large in the State Papers of the end of the seventeenth and beginning of the eighteenth centuries.

practice; and a shrewd courtier Quaker, like Penn, might well recognize that the stolid resistance of the colonists to any kind of mutual assistance might in the end lead to some invasion of colonial liberties. As proprietor of his thriving province, he was in a continual dilemma, between the Scylla of the colonists' aversion to the payment of their just dues and the Charybdis of the distrust of him felt at the Court of William III. His plan of a federal union is a rudimentary scheme enough, lacking any explanation of the means by which the decisions of the deputies at the General Assembly were to be enforced. Still it is of interest as a recognition of the evil: the final outcome of which was to be George Grenville's Stamp Act and the American Revolution.

Franklin's Scheme of Federation.

As time went on, the mischief against which union was necessary grew in size and gravity, whilst the Colonies became more selfishly absorbed, each in its own private concerns, and less and less inclined to follow the leading of the English governors. Especially in dealings with the Indians did the evils of a division of governments and of policies come to the fore. A meeting of Commissioners from the various Colonies was held in July, 1754, according to the instructions of the Board of Trade. The idea of union was in the air, and Franklin took advantage of this meeting to put forward the proposals for a more general union of the Colonies which are here set out. The scheme was adopted by the Commissioners: but it was in fact far ahead of the public opinion of the time, and was met with a chorus of disapproval by the various Assemblies. Upon the other hand, the Home Government might naturally be suspicious of Franklin's plan, as involving too great an invasion of the prerogative. The Board of Trade itself, in the same year, suggested a more limited kind of union confined to the subject of military defence. In submitting its plan the Board

pointed out that, in case one or more of the Colonies refused to enter into the union, either by failing to send representatives or by refusing to raise the required money, no other method of persuasion would be possible, except 'an application for the interposition of the authority of Parliament'. It is thus clear that the contemptuous rejection of the Albany plan of union by the colonial Assemblies cleared the way for the imposition of Parliamentary taxation. But it is possible that, had the Home Government ignored the opposition of the Assemblies, and legislated in the direction of the Albany plan, the Colonies might at the time have acquiesced in their decision. Still, it is unfair to suggest, as was suggested by Franklin, that part of the blame for the rejection of his plan rested on the shoulders of the Home Government. The Board of Trade contented itself with pointing out that whilst the Commissioners had considered the questions of the management and direction of Indian affairs, the strengthening of the frontiers, and the providing for these services by a general plan of union, they had refrained from making suggestions with regard to the two first, before the establishment of the union. With respect to the plan itself the Board of Trade dryly reported: 'The Commissioners having agreed upon a plan of union, which, as far as their sense and opinion of it goes, is complete in itself, we shall not presume to make any observations upon it, but transmit it simply for your Majesty's consideration.' In fact, the general situation in America soon became far too serious to admit of leisure for the elaboration of new Constitutions.

Meanwhile, it should be noted that Franklin's plan was a great improvement over previous proposals, because his Grand Council would have power to make laws and levy general duties and taxes. It would thus have come into direct contact with the individual taxpayer and have possessed power as well as authority. The difficulty of reconciling the rival principles of provincial equality and

of additional power to be given to wealth and population was met by enacting that in no case should the number of representatives exceed seven or be less than two: but, subject to this rule, that the number of members to be chosen for each Colony should depend upon the amount of its contribution to the general treasury. It is not very clear from a perusal of the plan what would have been the exact functions of the President-General and of the members of the Grand Council in the working out of the Constitution. But it must be remembered that colonial government, at any rate in New England, was, more and more, taking the form of government by means of Committees of the Assemblies, intruding upon the province of the Executive; so that a decorous reticence was necessary if the scheme was to have any chance of approval in England. Upon the whole, Franklin had good reason for his pride in his bantling. 'The different and contrary reasons of dislike to my plan', he wrote years afterwards, 'make me suspect that it was really the true medium; and I am still of opinion that it would have been happy for both sides if it had been adopted. The Colonies so united would have been sufficiently strong to have defended themselves. There would then have been no need of troops from England. Of course, the consequent pretext for taxing America and the bloody contest it occasioned would have been avoided. But such mistakes are not new; history is full of the errors of states and princes. Those who govern, having much business on their hands, do not generally like to take the trouble of considering and carrying into execution new projects. The best public measures are therefore seldom adopted from previous wisdom but forced by the occasion.'

Be this as it may, the old English colonial system, which received its deathblow by the loss of the American Colonies, never learnt to read the riddle of the Sphinx of federation. It remained to see whether the new empire,

which arose on the ruins of the old, would have more luck or more wisdom. At first, indeed, it seemed as though the lesson which the British Government had learnt from the loss of the American Colonies was a kindly rendering of the maxim, *divide et impera*. The Colonies were to be treated indulgently like favoured children; but anything in the nature of independent political life was to be, as far as possible, discouraged. Here and there voices were raised in favour of some kind of union of the British North American Provinces. Thus, at the time of the Constitutional Act of 1791, Chief-Justice Smith, a loyalist from New York, whose father had been a leading member of the Albany Congress, put forward an interesting scheme of federal union, which is not inserted in this volume, because it has been already printed in *Canadian Constitutional Development*, by Egerton and Grant, pp. 104–10, as well as in Shortt and Doughty, *Constitutional Documents*, 1759–91, p. 687. But, as will appear from the following summary of the history of British North America, the general tendency was in favour of the creation of separate and divided governments.

The British North America Act.

The Dominion of Canada, including all British North America with the exception of Newfoundland,[1] was formed out of several separate Colonies, differing altogether in their origin and character. When, as in the case of Lower and Upper Canada, union had been in name effected, it had been of so questionable and superficial a character as to perpetuate fundamental distinctions. It may be said that to accomplish a real federal union between the two Canadas was a task of more difficulty than to weld into a single union the English communities in the east and in the west. The eldest of the British American Colonies was Nova Scotia. Under a shadowy claim, resting on paper charters,

[1] If the Bermudas do not belong to the West Indies they still less form a part of British North America.

New Scotland dated from Stuart times: but, at any rate, from the Peace of Utrecht, in 1713, Nova Scotia was a recognized British possession, though even then the question, what was meant by Nova Scotia, was not finally settled, and the French put forward the pretension that it only included the peninsula, or a part of the peninsula, of what is now Nova Scotia, and that the future Province of New Brunswick was not included within its area. But, whatever were its nominal boundaries, the actual hold of Great Britain on Nova Scotia was slight indeed. The mother country looked to Massachusetts to organize effective occupation, and Massachusetts, at bay with the French and Indian perils, was unable to respond to the call, so that the new possession remained for the most part a waste country, and the French Acadian inhabitants were left to find their own answer to the puzzle: When is a British subject not a subject? Great Britain standing idly by, till, by the deportation of the people in 1755, it sought in a panic to make up for past neglect. The birth of Nova Scotia as a living British Colony dates from the foundation of Halifax in 1749, one of the rare occasions on which Great Britain has organized systematic colonization for imperial purposes. So carelessly and loosely was Nova Scotia governed that it was suddenly discovered in 1755 that the practice of enacting laws by its Governor and Council without the institution of an Assembly, was illegal, and therefore, in 1758, a representative Assembly was set on foot. After the Peace of Paris of 1763, Cape Breton Island was annexed to Nova Scotia: but, in accordance with the general policy of the time, it was constituted a separate government in 1784. In 1820, however, it was again reannexed to Nova Scotia.

New Brunswick owed its existence as a separate colony to the same cause which brought into being Upper Canada. Great numbers of American loyalists sought a new home in this portion of Nova Scotia, which was therefore constituted

a new province in 1784, under the name of New Brunswick. The last of the Maritime Provinces, Prince Edward Island, originally named St. John's, was till 1770 a part of Nova Scotia, when, according to the prevailing policy of division, it was formed into a separate government. It was a significant commentary on the wisdom of this action that separatist influences proved so strong in this little island that, but for financial considerations, it would probably have remained for some time beyond 1873 outside the Confederation.

Still, whatever artificial distinctions may have been engendered, themselves largely the outcome of mistaken policy in England, the Maritime Provinces were a homogeneous community, destined in the long run to the enjoyment of a common life. Identity of race, of interests, and of policy, must in the end have brought about union, even though the negotiations at Charlottetown in 1864 had, for the time, proved abortive.

But the same causes which pointed to a union of the Maritime Provinces, were directly hostile to a greater union. Nova Scotia, with its face to the Eastern sea, saw little to attract in the vision of union with the interior Colony, of whose politics it had little understanding, and with whose population, so far as it was French, it had not a little racial antagonism. Lord Durham had gone out to effect a federation of British North America; but, if there were no other difficulties in the way, the indifference and isolation of the Maritime Provinces must in any case have wrecked the scheme. Nova Scotia was largely under the domination of Halifax, and Halifax as a commercial and social centre was jealous of anything that might diminish its comparative importance. Many retired officers of the British army and navy had found a home in Halifax, and these men, with those related to them by marriage or social connexions, formed a Conservative stronghold which distrusted absorption in a greater Canada. At the other

extreme the Radicals, with the great Nova Scotian orator, Joseph Howe, at their head, were in 1865 equally opposed to Confederation. Imperilled business interests barbed the opposition to Confederation, and Howe, apart from personal motives, saw in it the deathblow to his splendid ideal of an imperial federation. In this state of things the wonder is, not that complete union was not achieved, but that even a federation was at length accomplished. On the other hand, it may be argued that a resolution in favour of the Confederation of British North America was passed by the Nova Scotian Assembly as early as 1854; but the subsequent history showed that this hardly reflected the settled opinion of the Colony.

In Canada, which, from her position and population, possessed the controlling voice in any scheme of closer union, the cause of Confederation was mainly won by two motives, themselves wholly separate, working in the same direction. In the first place there was the melancholy fact that party government in Canada had resulted in deadlock. In order to understand this state of things, it is necessary to review very briefly the constitutional history. The prolongation of the French system of paternal government, as recognized by the Quebec Act of 1774, came to an end in 1791, when the coming of loyal Americans into Upper Canada brought about the division of the province and the granting to both Upper and Lower Canada of a representative Assembly. Shrewd critics have doubted the wisdom of thus formally sanctioning the continuance of French separatism; but, if the French nationality and language were to continue—and there is no evidence that at that date, any more than at a later one, the province could have been successfully anglicized—it was surely wise for the British Government to yield with a good grace what might have been successfully exorted; especially as thereby the powerful weight of the Catholic Church was thrown into the scale on the side of the English predominance. The

position of the Catholic Church had been secured by the Quebec Act of 1774, and any attempt to anglicize the province would have been resisted, as making for the triumph of heresy. But although the division of Canada and some of its consequences may have been inevitable, none the less the political situation in both provinces became difficult and wellnigh impossible. The French-Canadians were without apprenticeship in local self-government and were for the most part wholly uneducated, so that they became as wax in the hands of their popular leaders. For many years an eloquent and genial demagogue, Louis Papineau, was the uncrowned king of the French-Canadian democracy; whilst there were marshalled in reserve on the side of law and order the forces of the Catholic Church. In the long quarrel between the English Executive and the French-Canadian Assembly there were faults on both sides. Not till nearly the close of the controversy did the French leaders begin to realize that responsible government would give the solution of their difficulties; and, in their demand for an elected Legislative Council, they were opposed by the full strength of the British minority, who knew enough of the doings of the French majority in the Assembly to fear their complete dominance in an elected legislature. When Lord Gosford's Commission found themselves compelled to reject the proposal which was the sheet-anchor of the French-Canadian demands, it became clear that some wholly new solution must be found if neither a policy of coercion nor of renunciation was to be adopted.

Meanwhile in Upper Canada causes, in appearance the same though in their essence altogether different, had brought about a political situation hardly more satisfactory. Here the grievance of an irresponsible Executive, confronted with an Assembly genuinely representative, was aggravated by the treatment of the clergy reserves question, which secured for the Church of a small minority of the popula-

tion the favoured position of the Church establishment at home. Archdeacon Strachan, a stalwart champion of his Church in its most militant mood, supplied political opposition with a weapon which it soon learnt how to wield. As in Lower Canada so in Upper, a single leading demagogue was able to put a match to the fire: though in the case of Upper Canada William Lyon Mackenzie's efforts would probably have been unavailing had they not been abetted by the eccentric and egotistical proceedings of the British Lieutenant-Governor, Sir Francis Bond Head. The conclusion was that in both Provinces there was an abortive insurrection, from a military point of view trifling enough; but most menacing, so far as it seemed to mark the breakdown of British colonial government. The next act in the drama is sufficiently familiar. Lord Durham's mission of 1838 was soon followed by his repudiation in the matter of the political prisoners banished to Bermuda, and his consequent resignation. In the following year the publication of his memorable Report marked an epoch in the history of colonial self-government, forcing as it did the hands of the Home Government, and involving a new state of things which as late as 1837 had seemed to the liberal mind of Lord John Russell incompatible with the continued existence of the colonial connexion. Lord Durham (as I have already mentioned) entered on his task with the idea that the solution of difficulties was to be sought in the application of the federal principle: but he found on his arrival that, while what had to be done must be done quickly, the French-Canadians were in no mood to become friendly partners in a federal British America. (There was the further difficulty, which I have already noted, that neither were the Maritime Provinces prepared at this time for such a solution.) But if federation was impossible, the only alternative seemed a complete union of the two Canadas. Such a union had been intended in 1822, when the difficulties with regard to the share of the Upper Pro-

vince in the customs duties received at Quebec and Montreal threatened an *impasse*. The measure had been then withdrawn in the face of the opposition of the French and of many of the English colonists; but the French-Canadians were now brooding in sullen despair, so that union could hardly add to their ills: whilst the outbreak in Upper Canada had sufficiently shown that the system of 'family compact' government could not ignore the writing on the wall. Moreover, Lord Durham believed that his other remedy for the existing evils, viz. the granting of complete responsible government, would finally appease all popular disappointment. It is worth noting that even Durham's conception of responsible government did not include the management by the colonial authorities of questions of trade, the Crown lands, or military defence. He recognized that, as things were for the moment, it would be impossible to give complete self-government to the French Province. As an Imperialist, he had no intention to diminish the British Empire; but the first act of a French-Canadian Executive, irresponsible except to its own Legislature, might have been to announce a peaceful secession. Responsible government was the goal: but responsible government postulated that the majority of the people in question were loyal subjects of the British Empire. Had Lower Canada stood alone, there might have been no answer to the dilemma; but happily the presence of Upper Canada pointed to the solution. Durham at once recognized, and it is to his credit that he so recognized, that, in spite of family compact government and William Lyon Mackenzie and his tragi-comedy of a rebellion, there was no real doubt as to the loyalty of Upper Canada to the British Crown. Could, then, a fusion be made of the two Provinces, the Upper Canadian electors might be trusted to secure the permanence of the British connexion. It was true that the population of the Lower Province was still greatly superior in numbers, but Durham was willing to trust to

time, along with the presence of the British minority in the Lower Province, to secure the predominance of British institutions. In his insular self-confidence he believed that the superiority of Anglo-Saxon ways and methods was so self-evident that it needed but due opportunity for its trumpet-call, and the walls of French Nationalism and language would come crumbling down from their sheer insufficiency. The new creed of Nationalism was soon to give forth a gospel very different from the imaginations of Liberals of the type and temper of Lord Durham.

What would have been the result of a real union, such as that advocated by Lord Durham, it is impossible to say, because such a union was never attempted. In its stead the two divisions of the Province were treated as separate entities, each having under the Act of Union of 1840 an equal number of members. At first the grievance was on the side of the French; but, as the population of Upper Canada grew by leaps and bounds, the burden was shifted on the other shoulder; till at the time of the British North America Act a majority of some 400,000 Canadians in the upper division had only the same representation as the population of the lower division. In other ways the Union only served to emphasize racial distinctions. The French-Canadians believed, and a perusal of Lord Durham's Report might justify them in that belief, that the Act of Union was intended as a blow to their separate nationality, and therefore sought by all possible means to prevent the blow taking effect. It must be remembered that in Lower Canada union was not the deliberate choice of a free people, but was superimposed on the people by a special council nominated by an autocracy. The French-Canadians had therefore no affection or respect for the system introduced. At the same time the majority were wise enough to see that their interests lay not in standing aloof from the new system, as the extremists advised, but in moulding that system to their interests. If the intention was to

swamp the French nationality in an Anglo-Saxon Province, the more necessary it was to maintain a separate French-Canadian organization for the attainment of French-Canadian ideals. During the time of Lord Sydenham's Government the French remained suspect, the memories of the rebellion being still fresh in the minds of men, and Sydenham was not prepared to accept the full consequences of responsible government, so far as it meant party government by a parliamentary majority. He aimed at being his own first minister and to rule through the best men chosen by himself on other than party grounds. Sydenham's attitude was well adapted for a period of transition, but it postulated a very strong Governor and a very simple Colonial Assembly. Meanwhile the French-Canadians had joined forces, for the purposes of opposition, with the Reformers from Upper Canada, and Sydenham's successor, Sir Charles Bagot, recognized that it was impossible to refuse as ministers those who represented the will of the majority. The next Governor, Metcalfe, in his heart distrusted the system of responsible government; and it was not till the government of Lord Elgin in 1848 that it can be said to have triumphed permanently. But simultaneously with that triumph, the internal difficulties in the way raised their head. Responsible government means party government, and party government means the ascendancy, at least, of two distinct parties. But in the Canadian Assembly there were four, if not five, distinct parties. There were the Upper Canadian Reformers, who held Radical opinions, the Conservatives from that Province, and the small faction which maintained the 'family compact' tradition. The French-Canadians were, at first, for the most part unanimous on the side of opposition, but when once they had been admitted within the portals of the Government, it was inevitable that their natural tendency to Conservative opinions should find expression: so that in time there developed a French-Canadian Conservative

party and a French-Canadian Radical party known as the 'rouges'. It was that astute parliamentary hand, John A. Macdonald, who first bridged the artificial gulf existing between the French-Canadians and the Conservatives. But, it must be remembered, Liberals and Conservatives from different portions of Canada, though sharing the same name, did not really hold the same views and opinions. Thus every ministry was a coalition, possessing the inevitable weakness of a coalition. How was it possible that strong Protestants from Upper Canada should see eye to eye with their Roman Catholic colleagues on such questions as education: or that the Upper Canadian grievance of the clergy reserves should interest much the French-Canadians? The dual nature of the Government was in every way emphasized. There were two first ministers, one English and one French. The Union Legislature started with a pre-eminence given to the English language, but this pre-eminence had soon to be taken away. To such lengths did mutual suspicion and distrust go that it came to be a kind of convention that a ministry must possess a dual majority; that is, a majority from both Upper and Lower Canada. The system was extremely expensive, as, if public money was spent on one portion of Canada, an equal sum had to be provided for the other. Thus, when the abolition of the seigniorial tenures in Lower Canada involved large payments from the public purse, an equal sum had to be given to Upper Canada. There was no real life in the party controversies, and the dreary struggle between the ins and outs never ended in a real victory. In three years four ministries were defeated, and two general elections only gave uncertain results. Meanwhile in Upper Canada the demand for representation by population was gathering strength: and Conservatives, as well as Liberals, from the upper division of the Province, were beginning to urge its necessity. But such a solution would have seemed to the French-Canadians a direct breach of a solemn engage-

ment, and would assuredly not have made for general harmony.

In this state of things, when the Union as framed by the Act of 1840 had been tried and found wanting, it was natural that men's minds should turn to the other solution of the difficulty which had in the past been more than once proposed and which had been the first choice of Lord Durham. In 1858 the Canadian Government advocated a Federal Union of British North America, Mr. Alexander Galt, the finance minister, having made the adoption of this policy a condition precedent to his joining the ministry. At the time but little encouragement was got in England; but the advocacy of federation by an opportunist ministry showed which way the wind was blowing. Equally significant was the attempt in the next year to rally the opposition in favour of a programme which proposed the formation of two or more local governments for the control of all matters of a local or sectional character, and some joint authority charged with such matters as were necessarily common to both sections of the Province. The attempt was not very successful, but at least it showed that practical politicians were feeling their way to some other solution of the problem than representation by population in a single Parliament.

Mr. George Brown, who first in 1864 pointed the way to a compromise, was the same statesman who, in his constant advocacy of representation by population and his profound distrust and dislike of French-Canadian Roman Catholicism and its fruits, had done much to bring about the breakdown of constitutional government.

If, then, we confine our gaze to Canadian party controversy there is ample ground for the assertion that the adoption of federation was a mere counsel of despair, occasioned by the bankruptcy of party government. No doubt economic motives were also at work. Fears at the coming termination of the Reciprocity Treaty of 1854 with the United

States marked the dangers of isolation The restrictions on intercolonial trade were more and more felt irksome, and the powerful interest of the Grand Trunk Railway Company worked, though silently, in the same direction.

Beyond and above all this there was besides, in the background, and for a time hardly consciously, a nobler motive at work. The idea of a greater Canada had for years been in the minds of thinking men. The conviction that one day or other the East and the West would be linked by the unifying force of a transcontinental railway had been expressed by Joseph Howe in 1851, and again by Chief-Justice Draper before the House of Commons Committee of 1857, which considered the rights of the Hudson Bay Company. The matter was complicated by Canadian claims to the company's territories which the Home Government could hardly recognize. Mr. G. Brown had advocated for some twenty years the annexation to Canada of the Northern and North-West territories; but as his advocacy had been part of a crusade against a 'grasping monopoly', it did not advance the movement much with cautious men. Moreover, owing to the sectional jealousies which prevailed, Lower Canada was opposed to the opening of the West, lest it should add to the importance of the Upper Division. The half-breeds in the Red River Settlement were mostly French-Indian Roman Catholics, and the development of the country might mean their submergence under a wave of Anglo-Saxon immigration. John A. Macdonald had not at first been in much sympathy with a movement which was mainly advocated by his Radical rivals; but as time went on he realized the danger lest Americans should occupy the hinterlands of Canada and intercept the road to the Pacific. What might have happened if the American Civil War had not given the people of the United States ample field for their energies in other directions, it is impossible to say; but it is very doubtful how far Americans would have recognized rights resting on charters, unenforced by occupa-

tion. Fortunately for the British empire, by the time that American pioneers were ready to advance into the Canadian West, the country had already become part of the Dominion. It is impossible to bring out the argument here, but it is certain that the recognition of the need of a greater Canada to secure an outlet for future population, and fear and suspicion of Canada's mighty neighbour to the south, were main contributing causes to the speedy success of the federation movement.

In this state of things, when the ultimate destinies of British North America and the immediate necessities of Canadian politics alike pointed to the need of a new departure, the visit of the Canadian delegates to the Charlottetown Conference of 1864 gave the directing touch to the course of the future history. It was decided to adjourn the Conference to Quebec, so as to consider the wider and broader Union which had been proposed. The Quebec Conference met on October 10th, and between that date and the 29th the seventy-two resolutions were passed which with a few variations represented the substance of the British North America Act. Canada, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland were represented; each Colony voting as one, except that Canada had two votes, Upper and Lower Canada being treated as separate Provinces. Among the builders of the new Dominion were the veteran French-Canadian Prime Minister Sir E. P. Taché, who did not live to see the consummation of his labours: George Etienne Cartier, the French-Canadian Conservative, who did more than any one to make federation possible by reconciling to it his French fellow-countrymen; George Brown, the stalwart champion of Upper Canadian interests; John A. Macdonald, most versed in the arts of party management, but, through all his party finessing, a fervent Imperialist; and Alexander Galt, who mapped out the financial arrangements of the new Constitution. From the Maritime Provinces came, with others,

Mr. Charles Tupper, who was to grow grey in honourable service to the Dominion, and Mr. Samuel Tilley, the leading figure in New Brunswick politics. At the second meeting a general motion in favour of a Federal Union was passed unanimously, and on the following day it was explained to mean a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas and for the Maritime Provinces, charged with the control of local matters in their respective sections; provision being made for the admission into the Union on equitable terms of the North-West Territory, British Columbia, and Vancouver. The proceedings of the Conference were not reported, so that our main knowledge of them is derived from the scanty notes published in Mr. Pope's *Confederation Documents*. There was complete unanimity as to the form which the federation should take, the American Civil War being an object lesson in the dangers of the system under which any kind of sovereignty could be claimed by the separate component parts. There was some division of opinion with regard to provincial representation in the Legislative Council, but there was no opposition to the proposal that members should be nominated by the Crown and hold office for life. Population was accepted as the basis of representation for the House of Commons by all the Colonies, with the exception of Prince Edward Island, which demanded more members than the five allotted to it under the scheme.

Although George Brown spoke in a private letter of the Conference being nearly broken up on the question of the distribution of members in the Upper Chamber, the most serious difficulty seems to have been over the financial provisions. The matter was complicated by the fact that in the Maritime Provinces there was no system of levying local rates for local needs. The Colonial Government had been the nursing mother of all provincial undertakings. In framing the new financial system it was necessary to

take this state of things into consideration, though the proposal to subsidize the Maritime Provinces was unpopular in Canada. At last, however, largely by the tact and ability of Mr. Alexander Galt, a *modus vivendi* was arrived at. After the passing of the Quebec Resolutions, George Brown proceeded to London, where he found that the scheme had given 'prodigious satisfaction'. The Home Government indeed only criticized two decisions of the Quebec Conference. They objected to the pardoning power, which was the prerogative of the Crown, being vested in the Provincial Lieutenant-Governors, and they considered that the members of the Legislative Council being fixed at seventy-two might lead to a parliamentary deadlock. The Quebec Resolutions were brought before the Canadian Parliament at the beginning of February, 1865. They were treated as the terms of a treaty between independent Powers, which could not be amended, but must be accepted or rejected *en bloc*. In spite of extremely able speeches against the Union from Mr. Antoine Dorion and Mr. Christopher Dunkin, the resolutions passed the House of Assembly by a majority of 58 in a house of 124 voting, and the Legislative Council by a still greater majority. But the ship of Confederation had not yet sailed into smooth waters. A general election in New Brunswick resulted in the rout of its advocates. The coalition Canadian Government, which had been formed for the one purpose of settling the future Constitution, saw its work indefinitely postponed; whilst the position was made more difficult by the death of the Prime Minister, and the inability of George Brown and John Alexander Macdonald to act in friendly partnership. Brown's resignation in the winter of 1865 was precipitated by differences with his colleagues as to the line to be taken in view of the termination in 1866 of the Reciprocity Treaty with the United States; but its real cause was his profound distrust and dislike of his predominant colleague, John A. Macdonald.

Although the deputation of Canadian Ministers which visited England in 1865 may not have attempted to induce the Imperial Government to force the Maritime Provinces into confederation, that Government could fairly claim to give advice, as being responsible for Imperial defence, and could make sure that the Lieutenant-Governors were in sympathy with the movement. The influence of the New Brunswick elections had been felt outside its borders. The Prince Edward Island Legislature now openly repudiated its own delegates, and in Nova Scotia the opposition was so powerful that the Government felt compelled to be content for the time being with a scheme of union among the Maritime Provinces. By the exercise, however, of patience and tact, Mr. (now Sir Charles) Tupper induced the Nova Scotia Assembly to agree to the appointment of delegates 'to arrange with the Imperial Government a scheme of union which will effectually insure just provision for the rights and interests of the Province'. Equally fortunate was the cause of confederation in New Brunswick. The Ministry, which was hostile to the movement, fell out with the Governor and resigned. A general election put Mr. Tilley again into power, and the new Assembly passed by a large majority a resolution similar to that passed in Nova Scotia, accompanied by a provision making it a *sine qua non* that the Intercolonial Railway should be constructed forthwith. Meanwhile in Canada the Governor, Lord Monck, was arging upon John A. Macdonald the necessity of prompt action. He had felt, when he formed the Coalition Ministry, that his last card in that suit had been played, and that, if he did not win, the time would have come when he must give up the attempt to manage the affairs of Canada. Unless the Canadian portion of the scheme could be passed during the present session, it was his intention to apply for his immediate recall. Macdonald was able to reassure the Governor. On the time and manner of bringing forward Canadian ministerial measures

he was doubtless the best judge. The resolutions, providing for the Local Governments and the Legislatures of Upper and Lower Canada, were duly passed, and everything seemed ready for the departure for England of the delegates who were to frame, along with the British authorities, the Confederation Act. A new delay was, however, imposed by a change of Government in England, and it was not till November 1866 that the Canadian delegates, Macdonald, Cartier, Galt, and three others, sailed for England, where the delegates from the Maritime Provinces had been since the summer. At a meeting of the delegates, held on December 4 at the Westminster Palace Hotel, the Quebec Resolutions were again adopted with some slight modifications. The paragraph with regard to the building of the Intercolonial Railway was made more explicit, and an undertaking given that the Imperial guarantee for three millions of pounds sterling, pledged for this work, should be applied thereto, so soon as the necessary authority had been obtained from the Imperial Parliament. The resolutions were finally agreed upon by the 24th of December by a unanimous vote. It was decided to avoid giving publicity to them until the Bill embodying them was settled and ready to be laid before Parliament. The proposals would no doubt offend private interests and individuals, and their publication would excite a new and fierce agitation in British North America: whereas 'the Act, once passed and beyond remedy, the people will soon learn to be reconciled to it.'

A Bill was framed in accordance with these resolutions and its provisions settled at meetings of the delegates with the Law Officers of the Crown and the Secretary of State, in the January and February of 1867. Drafts of the Bill at various stages are printed in Mr. Pope's *Confederation Documents*, but the differences are in fact very slight. The main alterations suggested by the Home Government were the removal of the pardoning power from the Lieutenant-Governors and the power given to the Governor-

General, under certain circumstances, to summon to the Senate three or six additional senators. The Bill finally became law, under the title of the British North America Act, 1867, on the 29th of March, and July 1 was proclaimed the day on which the new Constitution should take effect. A supplementary Act was also passed, authorizing a guarantee of interest on a loan to be raised by Canada towards the construction of a railway connecting Quebec and Halifax.

Thus was the Dominion born, though as yet, it must be remembered, its dimensions were small compared with what they were to be. Macdonald desired the more imposing title of Kingdom of Canada, and deplored the matter-of-fact attitude of English politicians; but after all, the future of Canada was in its own hands to make or to mar. No doubt, at the time of the British North America Act, many in England in their hearts approved of it as a half-way house to peaceful independence. There was required the experience of subsequent years before British statesmen could feel the proud confidence in the future which is now felt generally.

It has already been noticed that among the main motives moving in the direction of confederation was the desire for a greater Canada. It was then natural that, when once the Union was achieved, negotiations should have been entered upon with a view to securing to the Dominion Rupert's Land and the North-West Territory. As Lord Strathcona has pointed out, 'The acquisition and development of the Hudson Bay Territory was impossible prior to the confederation of the Dominion. No less a body than United Canada could have acquired and administered so large a domain, or have undertaken the construction of railways, without which its development could only have been slow and uncertain.' Resolutions were passed in the Canadian House of Commons in December, 1867, asking the Crown to unite Rupert's Land and the North-West Territory to Canada. Before effect

could be given to these resolutions, a private arrangement was necessary between Canada and the Hudson Bay Company. With this object, Sir George Cartier and Mr. McDougall, the proposer of the resolutions in the Canadian Parliament, visited England. Largely owing to the tact and diplomacy of the Secretary of State, Lord Granville, an agreement was arrived at, under which, in consideration of the sum of £300,000 and of certain reserved tracts of land, the Hudson Bay Company surrendered its territorial rights to the Crown, an arrangement to this effect having already received the sanction of the Imperial Legislature. It is unnecessary to recapitulate here the successive blunders which led to the Red River rebellion of 1869, which was suppressed by Colonel Wolseley's expedition of the following year. For present purposes, it is enough to note that by a Canadian Statute of 1870, the new Province of Manitoba was admitted a member of the Dominion. This Act was confirmed by an Imperial Statute of 1871, which declared that the Parliament of Canada might from time to time establish new Provinces in any territories forming part of the Dominion, and provide among other things for their representation in Parliament. Under the provisions of these laws Manitoba was given three senators, as well as representation in the House of Commons according to population. In 1905 the two new Provinces of Saskatchewan and Alberta were carved out of the North-West Territory and even now Western Canada is only in the beginnings of its greatness.

But even when Canada possessed its valuable hinterlands stretching to the Rocky Mountains, something was still lacking before British North America could become an organic whole. West of the Rockies was a valuable country, with an outlook to the Pacific Ocean, without which the Dominion would never have reached its full growth. Among the Quebec resolutions was one declaring that 'the communications with the North-Western Terri

tory, and the improvements required for the development of the trade of the great West with the seaboard, are regarded by this Conference as subjects of the highest importance to the federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.'

Fortunately, British Columbia was anxious to join forces with the Dominion. Vancouver Island had been leased in 1843 to the Hudson Bay Company. That company, intent upon the fur trade, saw in settlements a natural enemy. Nevertheless, the advantages of Vancouver Island for the purposes of colonization were too manifest for the reluctance of the company to prevent its development. On the mainland gold was discovered in the bed of the Fraser River in 1856, and from this time there set in a constant stream of immigration. At first, British Columbia, as it was named at the suggestion of Queen Victoria, and Vancouver Island were under the same Governor, but the interests of their populations seemed to be different, and, when a form of Constitution was given British Columbia in 1858, it was separated from Vancouver Island. The two Colonies were, however, again placed under a common government by an Act of Parliament of 1866. The population was as yet very small, and, to a great extent, migratory, so that the Home Government was unable to introduce responsible or even representative government. British Columbia was quick to recognize the significance of the passing of the British North America Act. In January, 1868, an unofficial memorial was presented to the Dominion Government, which suggested terms on which union would be acceptable. Such a union was desirable on many grounds, both financial and political: but a strong inducement was the expectation of a transcontinental waggon-road from Lake Superior to the point on the Lower Fraser river whence it was navigable, within a period of two years after joining the Confederat' The acquisition by the

Dominion of Rupert's Land and the North-West Territory made easier the way for union with British Columbia. When the proposals of British Columbia were considered by the Dominion Government, they were found to be reasonable, and such as, in the main, might be accepted. A transcontinental railway having now been decided upon, it seemed necessary to make another main road. The undertaking of the Dominion Government was therefore worded: 'The Government of the Dominion undertakes to secure the commencement simultaneously, within two years from the date of the union, of the construction of the railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada: and, farther, to secure the completion of such railway within ten years from the date of such union.'

Under the 146th section of the British North America Act power was given to the Crown, on addresses from the Houses of the Parliament of Canada and from the Legislature of British Columbia, to admit that Colony into the Union on such terms and conditions as were expressed in the addresses. British Columbia was therefore admitted into the Union under an Order in Council dated May 16, 1871, which embodied the terms accepted by both the Dominion and British Columbian Legislatures. Under these, British Columbia was entitled to be represented in the Senate by three members and by six members in the House of Commons: such representation to be increased with the growth of population according to the provisions of the main Act.

The difficulties which subsequently arose from the delay in beginning the work of the transcontinental railway do not belong to our present subject. It must always be remembered, however, that, if Canada has become or is in the way of becoming a real nation, with national

aspirations and ideals common to it as a whole, it is largely due to the building of the Canadian Pacific Railway. It is this which has covered with flesh and blood the dry bones of the Union brought into being by the provisions of the British North America Act. With the acquisition of British Columbia the Dominion stretched from ocean to ocean; though in 1873 it secured a new member, by the entrance into it of Prince Edward Island under the terms of the same section of the British North America Act as that which applied to British Columbia. In this case financial exigencies effected what had hitherto proved impossible. The representation of Prince Edward Island in the Senate was provided for in the British North America Act, which enacted that on its joining the Union the island should receive four senators, the number of senators for Nova Scotia and New Brunswick being respectively reduced from twelve to ten. Prince Edward Island started with six members in the House of Commons. By an Order in Council, dated July 31, 1880, all British territories and possessions in North America not already included within the Dominion of Canada, and all islands adjacent (with the exception of Newfoundland and its dependencies), were annexed to and formed part of the Dominion of Canada. Lastly, under an Imperial Act of 1886, doubt was set at rest with regard to the power of the Dominion Parliament to make provision for the representation in the Senate and House of Commons of Canada of any territories which, while forming part of the Dominion of Canada, were not included in any of its Provinces. In 1895 Newfoundland, under the stress of financial failures, sought to join the Confederation; but the Dominion Ministry was not quick to seize the proffered hand, and the opportunity, once missed, has never recurred.

Having sketched, however baldly, the history of Canadian federation, we are able to arrive at certain

obvious conclusions. In the first place, diversity of race and of interests dictated that it should be a federation and not a legislative union. To have proposed such a union would have been to court failure with the French-Canadians, and probably with the people of the Maritime Provinces. Moreover, the distances between the various Provinces were so great as to necessitate a more complete system of local self-government than is necessary in European countries. In the next place, it should be noted that the federation was accomplished in a country where there were no very large towns with a well-organized artisan population, so that a cautious Conservatism characterized the founders of the Dominion. In temperament and sympathies men like Cartier, Macdonald, and even Brown, far more resembled the type of the founders of the American Constitution than they resembled the Radical statesmen who framed the Australian Constitution. It is not without significance that whereas that Constitution provides for its alteration by the people of Australia acting under prescribed rules, the British Parliament is still the authority to which resort must be had when the Dominion Constitution requires amendment.

The British North America Act is further noteworthy as being a federal Constitution to a great extent drafted by men who were in favour of a legislative union. We know from Lord Blachford's *Letters* how leading a part was played by John A. Macdonald at the meetings in London which finally settled the form of the Act; but his influence at the Quebec Conference had been at least as powerful. It is to this influence that we may trace some features of the measure. Consider the half-hearted character in which the federal idea is worked out in the provisions with regard to the Senate. Of so little importance has the Senate proved as a bulwark of the federal principle that in the case of the representation in that body of the new Provinces the attempt has hardly

been made to give expression to that principle. On the other hand, the federal idea is strongly expressed in the rule, unknown to the written constitution, that the Dominion Privy Council must contain a proportional number of representatives from the different Provinces. We see again the vigorous hand of Macdonald in the provisions which, not content with the power of the Courts to pronounce provincial legislation *ultra vires*, give the Governor-General-in-Council, in other words the Central Government, the right to dismiss provincial Lieutenant-Governors as well as to disallow provincial measures: though it is fair to admit that the right of dismissal has been only once used unduly, and that the control of provincial legislation has upon the whole been exercised with great care and caution. In the elaborate division of powers in sections 91 and 92 we see an evident desire to exalt the central at the expense of the provincial governments, a desire which the subtlety of the Law Courts has known how to thwart. Still, while admitting faults in the Canadian measure, we must remember that it came first, and subsequent draftsmen have been able to profit by its failures: and, when all is said and done, the British North America Act will always be memorable, because, through its provisions and the triumphs of modern science which came in its wake, a new mighty nation sprang into life, of which as yet we know only the beginnings.

The Australian Commonwealth.

We have seen that in Canada political deadlock and the recognition of the need of westward expansion were the causes of federation. Moreover, the presence of a powerful neighbour to the south served to promote British North American union. In the Australian Colonies, on the other hand, there were present no such motives. The machinery, indeed, of party government worked with no little creaking and friction; but, somehow or another, the Queen's

Government was carried on, and there was little desire to plunge into unknown experiments. For years British Australasia seemed mistress in her own southern seas; and it is noteworthy that it was the threat in 1883 of the Germans in New Guinea which first set Australian public opinion moving in the direction of federation.

The inconvenience of a system under which neighbouring Colonies could forge against each other hostile tariffs had indeed been long recognized. As early as 1846 Mr. E. Deas-Thomson, the Colonial Secretary of New South Wales, recognized the need of some general control over intercolonial legislation: and in the following year Lord Grey outlined a scheme which, in fact, proposed a kind of federal constitution. 'There are questions', he wrote, 'which, though local as it respects the British possessions of Australia collectively, are not merely local as it respects any one of those possessions. Considered as members of the same Empire those Colonies have many common interests, the regulation of which in some uniform manner and by some single authority may be essential to the welfare of them all. Yet in some cases such interests may be more promptly, effectively, and satisfactorily decided by some authority within Australia itself than by the more remote, the less accessive, and, in truth, the less competent authority of Parliament.' He undertook to devise some method for enabling the various legislatures of the several Australian Colonies to co-operate with each other in the enactment of such laws as might be necessary for the regulation of their common interests, such as the imposition of duties on imports and exports, the conveyance of letters, and roads and railways traversing more than one of the Colonies.

Other portions of this dispatch aroused warm resentment in New South Wales, for reasons into which it is unnecessary here to enter; but the proposal with regard to an intercolonial Congress, though it attracted little notice,

won the approval of the Australian statesman, William Charles Wentworth. In order to be sure of his ground, Lord Grey referred the subject of the future of Australian government to the Committee of the Privy Council on Trade and Plantations, revived for the nonce, whose report, drafted by Sir James Stephen, after recommending the separation of Victoria from New South Wales, urged the necessity of a uniform tariff. Such a tariff should at first be set on foot by the Imperial Parliament; but any alterations it might require would necessitate the assistance of some authority, competent to act for the Australian Colonies jointly. For this purpose there should be a Governor-General of Australia, who should convene a General Assembly of Australia.

It was suggested that the General Assembly should consist of the Governor-General and of a single House, to be called the House of Delegates. The House of Delegates should be composed of not less than twenty, nor of more than thirty members. They should be elected by the legislatures of the different Australian Colonies.

Whilst certain subjects, the most important of which were the imposition of a uniform tariff and the establishment of a General Supreme Court, were expressly allotted to this Assembly, it was proposed that it should exercise more general powers of legislation if so desired by the Legislatures of all the Colonies represented in it. Such revenue as the General Assembly might require was to be obtained by the appropriation of such sums as might be necessary, by an equal percentage from the revenue received in all the Australian Colonies by virtue of any enactments of the General Assembly of Australia.

It is noteworthy as illustrating the temper of the time that among the subjects referred to this General Assembly no mention is made of military defence.

Unfortunately for the dispassionate discussion of such proposals the air in Australia was thick with the smoke of

fierce controversy. New South Wales resented bitterly the prospect of losing the rich and lucrative district of Port Phillip; while Port Phillip, anxious to start life upon lines independent of the parent Colony, was in no mood to welcome proposals for a common legislature, even with respect to certain specified subjects. It must be remembered also that South Australia had been started on lines directly opposed to those of New South Wales, and in its perhaps somewhat pharisaic purity was not ready to welcome association with those Colonies that were still held to be tarred with the brush of the convict system. Western Australia at the time remained in melancholy isolation, and was far from the stage at which it could take part in any kind of corporate life. In fact, it was not included in the Colonies represented in the House of Delegates under the scheme of the Privy Council.

There was a further objection which stood in the way of such a federation. It is the general experience of history that a federal system cannot work successfully where one of the members of the federation greatly exceeds the others in population and importance, and the peculiar form of the German Empire hardly makes it an exception to this rule. This was the rock upon which the association of the New England Colonies, established in 1643, had foundered. The position of Massachusetts was so preponderant as to make any form of federation either unfair to its interests or a nullity. So, under Sir James Stephen's plan, New South Wales, with a population at the last census of 155,000, would have been represented by twelve members in the federal legislature, the other three Colonies, with an aggregate population of 111,000, being represented by thirteen members. Whilst such a representation was less than that to which New South Wales was entitled by its population, it would still have given it a controlling voice, which the other Colonies would have naturally resented.

A further mistake was made by Lord Grey in at once introducing a Bill, on the lines of the Privy Council Report, without consulting the Colonies affected. It was proposed that a uniform tariff should, in the first instance be set on foot by the British Parliament. Under the provisions of the Bill it was apparently in the power of any two Colonies to compel the others to take part in a federal legislature. It proved, however, impossible to pass the Bill in the Session of 1849. Although in the Bill of 1850 the proposals of the Government were made more palatable, by dropping the plan of a uniform tariff to be set on foot by the Imperial Parliament, and by making the use of the General Assembly permissive instead of compulsory, they found little favour either in Australia or in England. The school of colonial reformers of the type of Sir William Molesworth were opposed to them on the ground that they were of English manufacture, and not the outcome of Australian public opinion, and for once supported the more timid critics, who saw in them the seed of a future independent and republican Australia. In this state of things, though not a little to the chagrin of Lord Grey, it became necessary to lighten the Bill by the omission of the clauses relating to a general legislature: and the Australian Government Bill of 1850 started the Australian Colonies on the constitutional way with no attempt to direct them into a common channel. 'I am not, however,' wrote Lord Grey, 'the less persuaded that the want of some such central authority to regulate matters of common importance to the Australian Colonies will be felt, and probably at an early period.' But he consoled himself with the reflection that, when this want was felt, it would of itself suggest the means by which it might be met. It was true that the separate legislatures would be unable themselves to establish a General Assembly, but arrangements might be arrived at between different Colonies, whilst application was made to the Imperial

Parliament to set on foot the necessary machinery. That Lord Grey was wise in seeking to avert the evils which undoubtedly resulted from a divided Australia, must be freely admitted. At the same time, in seeking to decide a question which mainly affected the Australian Colonies themselves by the external authority of the British Parliament, he was in fact injuring the cause he had at heart. What was necessary was to create a public opinion in Australia favourable to federation: but for many years the fact that a proposal originally issued from Downing Street was a reason why it should be regarded with suspicion.

Lord Grey had failed in his attempt to make possible a federal legislature, but it was still possible to appoint a Governor-General of Australia. The expanding interests and increasing relations of the Australian Colonies would necessitate some means of establishing a mutual understanding and concert between them: and it seemed fitting that the officer administering the government of the oldest and largest of these Colonies should be provided with a general authority to superintend the initiation and foster the development of such measures as they might deem calculated to promote their common welfare. But to place the Governor of any one of the Australian Colonies in a position of pre-eminence over his colleagues was merely to give occasion for that spirit of jealousy and rivalry which so strongly characterized the relations of the different Colonies; and the institution of a Governor-General was only not productive of mischief because it remained a mere title, barren of practical results. In any case, when responsible government was in 1856 set on foot, the rôle of the Governor-General in the promotion of the federal movement ceased to be of any possible importance; and, with the retirement in 1861 of Sir William Denison, the title was allowed to lapse.

After the failure of the federal clauses of the Australian Governments Act of 1850, the Home Ministry became

wary, and though they had some encouragement from both New South Wales and Victoria to insert federal clauses in the Acts of 1855 dealing with the new Constitutions of the Australian Colonies, they refused to interfere, believing that the present was not a proper opportunity for such an enactment. The initiative should come from the separate legislatures of the Colonies affected.

Henceforth the scene was wholly transferred to Australia, British statesmen being content that the Colonies should work out their own salvation in their own way. The question of some kind of federal union was much discussed in the Australian newspapers; but such discussion was, for the most part, of a somewhat academic character. There might be a community of race, language, religion, and economic and social conditions amongst the people inhabiting Australia: none the less particularist tendencies were growing stronger day by day. It is true that Mr. Deas-Thomson, who again took office in New South Wales under the new system of government, expressed the opinion that the tariff was one of those federal arrangements which ought not to be touched without consulting the neighbouring Colonies, and added his conviction that the time was not far distant when all the Colonies would adopt some federal arrangement: but Mr. Deas-Thomson received no support from any of his colleagues. It is true, also, that Wentworth, who was at this time in England, urged, as a leading member of the Australian Association (a body of gentlemen interested in Australian questions), upon the Colonial Office the necessity of permissive legislation; but Mr. Labouchere, the Secretary for the Colonies, was very sceptical as to the public opinion behind the federal movement. He suggested, in fact, the alternative policy of Intercolonial Conferences and co-operative action, which for many years held the field.

Still there were not wanting signs which seemed to presage success to the federal movement. The rapid growth of Victoria in wealth and population owing to the

discovery of gold removed one impediment from the way, by removing the pre-eminent position of New South Wales. A new arrival in Victoria, Mr. Gavan Duffy, threw himself heart and soul into the movement for a federal union. Just as among the founders of the American Republic, men like Alexander Hamilton and James Wilson, who were themselves new comers to the American continent, found it easier to embrace national ideas than men brought up and fostered amongst provincial prejudices, so Gavan Duffy, fresh from struggles on behalf of Irish national aspirations, was at once taken by the idea of an Australian nation. But there was no such compelling necessity as finally vanquished American provincial prejudices; neither with all his qualities was Gavan Duffy quite of the stuff of the founders of the United States. Still the Report of the Committee of the Victorian Assembly,[1] which considered the subject of federation, drafted by Duffy, was one of the ablest documents in favour of the movement which has ever been written. 'Neighbouring States of the second rank', it was said, and the words were quoted with approval in 1890 by Sir Henry Parkes, 'inevitably become confederates or enemies. By becoming confederates so early in their career the Australian Colonies would, we believe, immensely economize their strength and resources. They would substitute a common material interest for local and conflicting interests, and waste no more time in barren rivalry. They would enhance their material credit and obtain much earlier a power of undertaking works of serious cost and importance. They would not only save time and money, but obtain immense vigour and accuracy by treating larger questions of public policy at one time and place, and in an assembly which it may be presumed would consist of the wisest and most experienced statesmen

[1] In quotations from the Reports of the Victorian and New South Wales Committees I have availed myself of Mr. C. D. Allin's *The Early Federation Movement of Australia* (Kingston, 1907, a valuable book, which perhaps is not so well known as it deserves to be.

of the colonial legislatures. They would set up a safeguard against violence and disorder, holding it in check by the common sense and the common peace of the federation. They would possess the power of more promptly calling new States into existence throughout their extensive territory, as the spread of population required it, and of enabling each of the existing States to apply itself without conflict or jealousy to the special industry which its position and resources render most profitable.'

'No single Colony', it was recognized, 'ought to take exclusive possession of a subject of such national importance or venture to dictate the programme of union to the rest. The only means of solving difficulties was to hold a Conference of delegates from the respective Colonies. To such a body would belong the duty of determining whether the plan of union to be submitted to the people should propose merely a Consultative Council, authorized to frame propositions for the sanction of the State Legislatures, or a Federal Executive and Assembly, with supreme powers on national and intercolonial questions, or some compromise between these extremes. The Report closed with an expression of the conviction that a negotiation, demanding so much caution and forbearance, so much foresight and experience, must originate in the mutual action of the Colonies and could not safely be relegated even to the Imperial Legislature.

In spite of the favourable Report of a Committee of the New South Wales Council, which practically adopted the recommendations of Duffy's Committee, the cause of federation made no advance in the parent Colony. On a change of Ministry the new Prime Minister was actively hostile. Jealousy and distrust of Victoria were unhappily rampant; and few regretted the decision of the Government to turn a cold shoulder on Mr. Duffy's proposals. South Australia, on the other hand, was ready and willing to send delegates to the proposed Conference, as also was Tasmania; but, in the face of the opposition of New South

Wales, it was recognized that for the time being no progress could be made. In 1860 the moment seemed more opportune, as a Ministry more favourable to federation was in power in New South Wales, but that Ministry soon received its *quietus*, and the new Colonial Secretary, Mr. J. Robertson, was no friend of Victoria. Meanwhile a new Australian Colony had been carved out of New South Wales. In 1859 Queensland had been made a separate Colony, and had, therefore, now to be separately approached. Jealous of her new position, Queensland was somewhat distrustful of proposals which might, in the words of the Colonial Secretary, Mr. R. Herbert (who was afterwards permanent Under Secretary at the Colonial Office), 'tend to limit the complete independence of the scattered communities peopling the continent,' or 'interfere, in however remote a degree, with their present direct and happy relations with the mother country'. Still he recognized that a Conference of the character suggested would be attended with many important results, as enabling the respective legislatures to gather from the reports of their delegates the views and requirements of the other Colonies concerned, with respect to all topics bearing upon their mutual interests, and to determine to what extent a federal union of the whole group would be practicable or expedient.

Notwithstanding the failure to arrive at definite results, Mr. Gavan Duffy continued actively at work. In 1862 another committee reported, urgently advising that the present opportunity should not be lost. 'The condition of the world', it was said, 'the danger of war, which to be successfully met must be met by united action, the hope of a large immigration, which external circumstances so singularly favour, the desire to develop in each Colony the industry for which nature has fitted it, without wasteful rivalry, and the legitimate ambition to open a wider and nobler field for the labours of public life, combine to make the present a fitting time for reviving this project. It is

the next step in Australian development. In the eyes of Europe and America what was a few years ago known to them only as an obscure penal settlement in some uncertain position in the Southern Ocean, begins to be recognized as a fraternity of wealthy and important States, capable of immense development; and, if our current history and national character are in many respects misunderstood, we shall perhaps best set ourselves right with the world by uniting our strength and capacity in a common centre and for common purposes of undoubted public utility.' But New South Wales was not to be converted by Duffy's eloquence; and when an Intercolonial Conference was held in 1863 upon the question of the tariff, its report baldly affirmed that 'the subject of the federation of the Australian Colonies was not taken into consideration, for although the question has during some years occupied the attention of several of the legislatures, the delegates had no instructions in the matter, and it did not seem probable that its discussion at present would be attended with any benefit.' With the failure of Mr. Duffy's efforts in 1863 the question of federation for many years slumbered. The alternative policy of holding Intercolonial Conferences on particular subjects was adopted instead. It was at one of these Conferences, held in 1867, to discuss the question of postal communication with Europe, that Mr. Henry Parkes, who afterwards played so leading a part in the triumph of federation, first expressed his belief that the time had come when the Australian Colonies should be united by some federal bond of connexion. Questions were coming to the fore that could not be satisfactorily dealt with by any one of the individual governments. But meanwhile the lion in the way, to whose coming Lord Grey had looked forward with natural apprehension, was growing to formidable dimensions. Without an agreement on the question of the tariff any form of federal union would have been a mockery and a delusion; but by 1870 both Victoria

and New South Wales had so strongly espoused the rival causes of protection and free trade as to make any agreement upon a uniform tariff impracticable. The Colonies could indeed agree that the Imperial Government had no right to interfere with their freedom to allow to each other differential terms, but, beyond this, agreement was impossible. Some ground seemed to be gained when at a Conference in 1880, at which New South Wales, Victoria, and South Australia were represented, a resolution was passed in favour of a federal Council to deal with inter-colonial matters. A Bill for creating such a Council was drafted and submitted to the adjourned Conference in 1881, at which seven Colonies were represented. In the memorandum accompanying the Bill it was affirmed that while the time had not come for the construction of a federal Constitution with a federal Parliament, the time had come when a number of matters of much concern to all the Colonies might be dealt with more effectually by some federal authority than by the Colonies separately. An organization, it was added, which would lead men to think in the direction of federation, and accustom the public mind to federal ideas, would be the best preparation for the foundation of a federal government. But even this modest proposal of a Bill to prepare the way for the future was lost; Victoria (probably because the proposal emanated from New South Wales), Queensland, and New Zealand voting against it, New South Wales, South Australia, and Tasmania in its favour. The Western Australian delegates refrained from voting.

But, while apathy and mutual suspicion reigned when purely domestic questions were at issue, with foreign interference threatened the Australian Colonies began to realize that union was in a real sense strength. In 1883 there came the rumour of German annexation of the North of New Guinea. Queensland sought to force the hands of the Home Government by taking possession of the whole island

in the name of the Queen; but Lord Derby disavowed its action. In fairness to the Home Government it should be remembered that in 1876 New Guinea, as well as the New Hebrides, might have been gained for the empire had the Australian Colonies, in Lord Carnarvon's words, been ready 'to give trial and effect to the principle of joint action amongst the different members of the empire in such cases.'

Be this as it may, with Prince Bismarck directing the helm, there was little opportunity to make up for past errors, and before the Australian Colonies could take common action, German New Guinea was an accomplished fact.

An Intercolonial Conference had indeed been held in November, 1883, at which Mr. Service, the Victorian Prime Minister, urged the necessity of binding closer the ties which bond the Colonies to each other by the establishment of a federal union with regard to such matters as the Convention might specifically determine. His intention, apparently, was to bring about a real federal government; but the resolutions, which were finally adopted, only recommended the creation of a federal Australasian Council for certain specified purposes: among which the most important was the protection of Australasian interests in the Pacific. A Bill to this effect was drafted, establishing a federal Council, possessing legislative but no executive powers, and without the financial means of enforcing its measures. The Bill only applied to the Colonies whose legislatures should pass Acts adopting it; and New South Wales and New Zealand stood aloof from such legislation. Considering the past record of the two Colonies, it was somewhat unfortunate that Mr. Parkes now poured ridicule on a proposal closely resembling his own of a few years back. The federal Council he now described as a 'rickety body', likely to 'impede the way for a sure and solid federation'. No good object could be served by creating a body such as this

Council. New South Wales should avoid 'joining in making a spectacle before the world, which would cover us with ridicule'. Undeterred by such criticism, the other Colonies decided to persevere and the Australasian Federal Council Act of 1885 was passed through the British Parliament It may have afforded, in Mr. Bryce's words, 'a very scanty, fragmentary, and imperfect sketch of a federal Constitution'; and in truth the legislation which it enacted, though doubtless useful, was not of a very striking character. But at least the establishment of a federal Council marked the first step in advance; and, whilst its usefulness was no doubt lessened by the absence of New South Wales, its existence in no wise stood in the way of other attempts at federation. In any case the presence of Fiji, though its delegates only attended the first meeting of the Council, was a noteworthy sign of the solidarity of Australasian interests in the Pacific.

Just as in 1883 the fear of foreign intrusion gave a stimulus to the desire for closer union, so again in 1889 the issue of a report by Sir J. Bevan Edwards on the military defences of the Australian Colonies was made the occasion by Sir Henry Parkes of again bringing the subject to the fore. He urged the necessity of appointing a Convention of leading men from all the Colonies, delegates appointed by the authority of Parliament, who would fully represent the opinions of the different Parliaments. To such a Convention it would belong to devise the Constitution which would be necessary for bringing into existence a federal Government, with a federal Parliament for the conduct of national business. Victoria still held that use might be made of the machinery of the Federal Council. However, it was finally agreed that 'an informal meeting of the Colonies' should be held 'for the purposes of preliminary consultation'. At this preliminary meeting, which was held in February, 1890, in proposing the union of the Australasian Colonies under one legislative and executive

Government, on principles just to the several Colonies, Sir H. Parkes insisted that, whatever might be the decision of the Conference, it would be playing at federation if they attempted to create a federal Government with anything less than the full powers of a federal Government. He was as anxious to preserve the proper rights and privileges of the Colony of New South Wales as any one could be of preserving the proper rights and privileges of the Colony of Victoria. But the federal Government must be a Government of power. It must be a Government especially armed with plenary power for the defence of the country. It must be a Government armed with plenary power for the performance of other functions pertaining to a national Government, such as the building of ships, the enlistment of soldiers, and the carrying out of many works in the industrial world which might be necessary for the advancement of a nation. It might be wise that some of these powers should come into force with the concurrence of the State or Provincial Legislatures. It might be wise to stipulate for some kind of gradation in approaching the full powers of the federal Government, or before consummating its full power; but that it should be in design, from the very first, a complete legislative and executive Government, suited to perform the grandest and the highest functions of a nation, could not, he thought, be a matter of doubt. He asked the members of the Conference to keep in mind the fact that they represented the whole population of Australasia; that in that population there was a wide, rapidly increasing wave of men Australian born, many of them standing as it were in the early dawn of manhood. In supporting the resolution, Sir Samuel Griffith again insisted that there could be no real federation without a federal executive; while a federal executive must, in order to give effect to its decrees, have a federal revenue, which could only be raised by the direct representatives of the people. The advantages of federation, like everything else, would

have to be paid for. They could not be got without giving something in return, and every power which might be exercised by the federal Government with greater advantage than by the separate Governments would involve a corresponding diminution in the powers of the separate Governments and Legislatures. In spite of the not very friendly attitude assumed by Mr. Playford, the delegate from South Australia, and by Sir J. Lee Steere, who represented Western Australia, the members of the Conference unanimously agreed to take the necessary steps to induce the legislatures of their respective Colonies to appoint delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a federal Constitution. The New Zealand delegates were unable to hold out hopes that their Colony would for some years be ready to enter the proposed Union; but they were willing to attend the proposed Convention.

The meeting of the National Australasian Convention which met at Sydney in March, 1891, was of great importance, because now, for the first time, Australian statesmen wrestled with the details of the subject of federation, no longer confining themselves to general propositions; and because the Bill that was the outcome of their labours to a very great extent foreshadowed the proposals of the Commonwealth Act of 1900.

Rightly or wrongly—rightly from the point of view of future edification, perhaps wrongly in the interests of the swift dispatch of business—it was decided that the Convention should sit with open doors, though the actual work of drafting was done informally by sub-committees. The Convention consisted of forty-five delegates from the seven Australasian Colonies. Although, as has been already intimated, the temper of the discussions was of a more radical character than that of the discussions at the Quebec Conference, there was for the most part the same determination expressed to maintain the British connexion. Mr. Dibbs,

indeed, a New South Wales Protectionist, boasted that they were gradually whittling away the powers of the Crown and creating for the future the Republic of the United States of Australia. 'To cut the last link of connexion with the Crown, and to establish the Republic of Australia, that is what we are coming to, and it is the inevitable destiny of the people of this great country.' But his words found little echo at the Convention; and were severely handled by Mr. Gillies, who had been the Prime Minister of Victoria, and by Sir Henry Parkes. More interesting was the intervention into the general debate of Sir George Grey, who, in three different Colonies, had done splendid work as the representative of the Crown, and now eagerly demanded that every member of the Government, including the Governor-General, should be elected by the people of the country. Sir George Grey was not greatly interested in the question of a general federation. To him the important point was that the elected legislatures of every State should have an absolutely free hand to determine what should be their form of government. But Sir George Grey was in closer touch with the future trend of events when he proposed that the Bill constituting the Commonwealth of Australia, before being laid before the British Parliament, should be submitted to and adopted by a majority of a plebiscite of the people of Australia.

One of the most suggestive speeches in the discussion was that of Sir Samuel Griffith. Recognizing the necessity under a federal system, modelled on that of the United States in leaving to the separate States the residuary powers of government, of a Senate possessing equal powers with those of the Legislative Assembly, he expressed grave doubts as to how far the British system of responsible government could be worked under such a Constitution. Another delegate went further, and affirmed that 'either responsible government would kill federation, or federation would kill responsible government'.

The Bill as it finally emerged from the Constitutional Committee was mainly the handiwork of Sir S. Griffith: and was with a few alterations, of which none was of importance, adopted in its entirety.

The main crux in the way was with regard to finance. All were agreed that, side by side with 'the Commonwealth', there should be the States, with equal representation in the Senate; but the further question arose, Was the House of Representatives to be predominant in questions of finance; and, if so, would not the Senate be reduced to a position of inferiority? Under the compromise of 1891, laws appropriating any part of the public revenue or imposing any tax or impost must originate in the House of Representatives (sec. 54). The Senate had equal powers with the House of Representatives in respect of all proposed laws, except laws imposing taxation and laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate might affirm or reject but could not amend. But the Senate might not amend any proposed law in such a manner as to increase any proposed charge or burden on the people. Laws imposing taxation must deal with the imposition of taxation only.

In the case of a proposed law which the Senate might not amend, it might at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein; and the House of Representatives might, if it thought fit, make such omissions or amendments, or any of them, with or without modifications.

(It should be noted that the Bill of 1891 did not contain the provisions regarding the measures to be taken in the event of a deadlock between the two Houses, which are found in section 57 of the Commonwealth Act of 1900.)

The mode of electing the Senate presented another difficulty. A nominated Second Chamber, in spite of the Canadian precedent, is perhaps an impossibility in a

genuinely federal Constitution, and in any case it would have been an abomination to these stalwart Radicals. For the present, however, they were content that the members of the Senate should be elected by the State Legislatures.

With regard to the Executive, there was no direct injunction, such as is found in the later Act, that the members of the Executive Council must sit in Parliament. The intention, according to Sir S. Griffith, was so to frame the Constitution that responsible government might, not that it must, find a place in it. The actual words of the Bill were: 'Such officers shall hold office during the pleasure of the Governor-General, and shall be capable of being chosen and sitting as members of either House of Parliament.' It must be remembered, however, that in neither the British Constitution nor in the Colonial Constitutions which imitated it, with the exception of two Australian Constitutions, was there any express enactment that ministers must be in Parliament; so that the practical results of the clause as originally drafted would probably have been the same as those of the existing law.

The provisions of the Bill with regard to a federal judicature did not materially differ from those of the Commonwealth Act, except that they left to the Parliament discretion as to the establishment of a Supreme Court. With regard to appeals to the Privy Council, the Bill, after making final the decisions of the Supreme Court, after its establishment, provided that the Queen might in any case in which the public interests of the Commonwealth, or of any States, or of any other part of the Queen's dominions, were concerned, grant leave to appeal to herself in Council against any judgement of the Supreme Court. It would seem that the subjects on which a right of appeal is given, with the exception of the last, are precisely the subjects on which a right of appeal is taken away by section 74 of the Commonwealth Act, as it was drafted in Australia for introduction into the Imperial Parliament.

Notwithstanding the demand for guarantees in the opposite directions from both Victoria and New South Wales, it was impossible to fetter the freedom of the Commonwealth Parliament in the framing of a tariff: and it was merely declared that trade between the Colonies should be free, on the adoption of a uniform tariff.

The question which most puzzled the delegates was the question upon what basis of apportionment should the surplus revenue be returned to the different States. Inasmuch as the customs revenue would be collected by the Commonwealth, and the revenue of the Australian Colonies had been to a very great extent made up of the proceeds of customs duties, the income of the Commonwealth would be very great; while, as the States maintained their public debts and expenditure, the demands upon the Commonwealth income would be much less than its returns. Was the revenue to be returned according to population, or according to contribution, or according to a basis depending upon both? The Bill of 1891 made contribution the sole basis. After the federal expenditure had been provided for, the surplus was to be returned to the several States 'in proportion to the amount of revenue raised therein respectively'. It is unnecessary here to go into the complications connected with this subject. With regard to the amendment of the Constitution, the Bill of 1891 made State Conventions, elected in such manner as the Parliament might decide, the bodies whose ratification was necessary. Any proposed alteration must be approved by Conventions of a majority of the States.

Although the Bill of 1891 had been the outcome of some five weeks' hard work on the part of the delegates, there was no readiness on the part of any of the Colonial Legislatures to accept its conclusions as more than the starting-point of a future measure. In New South Wales the Labour Party, which had now come into prominence, was sceptical as to the benefit to be derived for its own class interests from

federation; whilst many Free Traders shrank from putting their principle of free trade in the power of the Victorian Protectionists. So threatening was the situation that Sir Henry Parkes despaired of carrying federation through by parliamentary action alone. The only feasible plan was, he wrote, 'for the people themselves, the electors, who sent us into this Assembly, the electors themselves throughout the Colonies, to elect another Convention to revise the draft Constitution of the late Convention, or to frame a new Bill, if in their wisdom they think proper to do so.' In the light of the subsequent history we see the wisdom of Sir Henry Parkes's advice, but at the time it was neglected. The subject was up to a certain point dealt with by the Victorian, the South Australian, and the Tasmanian Legislatures; but there was little driving force behind, and when, in 1893, the consideration of the Bill by the New South Wales Parliament was indefinitely postponed, the fate of federation throughout Australia was for the time sealed. Financial depression further played its part in the nineties in occupying men's minds with other thoughts than those of political federation. The Australian Parliaments had failed in their attempts to bring about federation: it remained to create a public opinion amongst the rank and file of the people in favour of the movement. To the Australian Natives Association, a social and political organization, which advocated a federated Australia for an Australian nation, belongs the credit of having aroused public opinion from its long apathy. An Australian Federation League was formed, with numerous branches, and in the summer of 1893 a resolution was passed at a numerously attended Conference, which first made possible the subsequent course of events. It recommended that the legislature of each Australian Colony should pass an Act providing for the election of representatives to attend a Statutory Convention or Congress to consider and adopt a Bill to establish a federal Constitution for Australia.

which should afterwards be submitted by some process of referendum to the verdict of each Colony. A Bill was afterwards drafted, which formed the basis of the various enabling Acts passed in all the Colonies. By making the measure to depend upon popular support at both ends, first in the popular election of the delegates, and then by the measure being submitted to the electors for their approval or disapproval, the question was rescued from the grip of parliamentary routine and brought distinctly home to the mind and sympathies of the electors. A Conference of Premiers, held at Hobart in January, 1895, endorsed the proposals of the Australian Natives Association. The draft Bill, embodying them, provided that the Convention, after provisionally framing a Constitution, should then adjourn for sixty days before its final consideration. The Australian Legislatures would thus be able to express their opinions on the measure. In the winter of 1895 6 enabling Acts were passed in New South Wales, Victoria, South Australia, and Tasmania. In Queensland it excited opposition on a side issue, and had to be withdrawn; and in Western Australia the delegates were to be chosen, not by the people, but by the two Houses of the Legislature sitting together. Moreover, in this Colony the Constitution, as framed by the Convention, was only to be submitted to the people if approved by Parliament.

In March, 1897, the election was held for the members of the Convention in the four Colonies, and the Western Australian Parliament elected its representatives. Each Colony was represented by ten members, so that the Convention in the absence of Queensland consisted of fifty members. The first meeting took place on March 23rd, 1897, at Adelaide. Mr. Barton, a New South Wales delegate, who had made a special study of the subject of federation, undertook the duties of 'leader of the Convention'. It was thought necessary to start the discussion *de novo* with a long debate on general resolutions, which occupies

some four hundred pages of a double-columned volume. But assuredly the time was not wasted. The speeches showed a closer grip of the difficulties to be surmounted and a clearer recognition of the necessity for compromise.

The speech of Mr. Deakin rose to a level of eloquence not easy to surpass. 'Is it possible', he said, 'when the Australian people for the first time have emerged as an Australian people, represented in an Australian Assembly to draft an Australian Constitution, that its great promise should disappear unfulfilled? . . . The Constitution we seek to prepare is worthy of any and every proposed sacrifice, for it is no ordinary measure, and must exercise no short-lived influence, since it preludes the advent of a nation. . . . We are the trustees for posterity, for the unborn millions, unknown and unnumbered, whose aspirations we may help them to fulfil, and whose destinies we may assist to determine.' The proceedings at Adelaide lasted a little more than a month, and at the end a Bill had been settled, which, though it did not represent the unanimous voice of the delegates, at least bore witness to a gradual *rapprochement* among them, which promised well for the future. It was soon apparent that the question of the tariff was no longer a lion in the way; the main difficulty being over the question of the Senate and its relations to money bills, and over the financial provisions. Suggestions were thrown out in committee foreshadowing the arrangement afterwards made to avoid deadlocks, but the Bill at this stage contained no such provision. In spite of the acute ἀπορίαι of Sir Richard Baker, it was recognized that the system of responsible government was inevitable, and members of the Executive Council were obliged to become members of Parliament within three months of taking office. The clauses with regard to the distribution of the surplus revenue from customs duties were still in a form far from satisfactory to the smaller Colonies.

The reception of the Bill by the various Australian Parlia-

ments seemed to show that the lesson of the need of compromise had hardly yet become sufficiently taken to heart if federation was to become an accomplished fact. However, the delegates entered the adjourned session at Sydney in September, 1897, with good hopes of final success During the sitting at Sydney some progress was made towards the solution of the relations of the two Houses The necessity of some safety-valve was affirmed, and the principle approved of a joint sitting after a simultaneous dissolution; but under the amendment which was carried a three-fifths majority at the joint sitting was necessary.

The Convention again adjourned to Melbourne, where from January 20th to March 17th, 1898, the sittings were held from which the Bill emerged in its final shape. The subject of the control of the navigable rivers proved one of great difficulty, South Australia desiring and New South Wales opposing the federal control not only of navigation but of irrigation and of water conservation generally. The difficulty of forbidding railway preferential rates without interfering with legitimate competition, was met by entrusting the decision of such questions to the Interstate Railway Commission established by the Bill. The solution arrived at with regard to deadlocks by the Sydney Convention was, with some slight modifications, again approved. With regard to the financial clauses, the Convention in substance returned to the solution of the Bill of 1891, coupled with what was known as the Braddon Clause, under which not more than one-fourth of the net revenue of the Commonwealth from duties of customs and excise should be applied annually by the Commonwealth towards its expenditure.

The main points of difference between the Bill of 1898 and the Bill of 1891 were that under the latter the senators were to be elected by the legislatures of the States. Under the former, they were to be elected by the people. Under the latter, equal representation in the Senate was given to all States absolutely. Under the former, it was only the

original States that were of necessity to be equally represented in the Senate. In the Bill of 1891, the suffrage for the House of Representatives was left to the decision of the various States. In the Bill of 1898, it might be controlled by a uniform law made by the Parliament. Under the Bill of 1891, the qualification of senators was the attainment of the age of thirty years and a five years' residence in the Commonwealth. Under the Bill of 1898, it was the same for both Houses of Parliament, namely the attainment of the age of twenty-one years and a three years' residence. Under the Bill of 1891, the division of electorates for the House of Representatives rested with the States. Under the Bill of 1898, that power was subject to revision by the Parliament of the federation. In the later Bill the power to legislate with regard to insurance, invalid and old age pensions, alien races such as the Chinese, the acquisition or extension of State railways with the consent of the State in question, and lastly, the appointment of Courts of Conciliation and of Arbitration in industrial disputes extending beyond the limits of one State, were added to the powers of the Federal Legislature. The provision with regard to deadlocks between the two Houses was also first found in the later Bill.

In the Bill of 1898. Ministers were compelled to sit in Parliament, a provision which was not contained in the earlier measure. Again, in the later Bill the interpretation of the Constitution by the High Court was made final. It was thought 'right and fit that the highest Court in Australia should be left as the guardian of the expressions of the people, and the sole body to determine finally what the people meant when they used those expressions'. Under the Braddon Clause of the Bill of 1898, one-fourth only of the net revenue of the Commonwealth was allowed to be expended by the Commonwealth. While both Bills made the Federal Parliament the authority to grant bounties, that of 1898 allowed the States to give bounties for pro-

duction and export, with the consent of the two Houses of the Federal Parliament expressed by resolution. Lastly, the later measure substituted a referendum for State Conventions as the means by which alterations should be made in the Constitution.

But though the Bill of 1898 represented the laborious and honest efforts of the ablest of Australian public men, victory was not yet; and, when the popular vote was taken in New South Wales, Victoria, Tasmania, and South Australia, it proved that in New South Wales the Bill had not obtained in its favour the statutory number of eighty thousand votes. In Victoria, Tasmania, and South Australia the cause of federation was successful: but it was impossible to go further without New South Wales.

At a meeting of Premiers held at Melbourne in January, 1899, which was attended by the Queensland Prime Minister, a unanimous decision was arrived at on the points in dispute. The requirement of a three-fifths majority at the joint sittings of the Senate and House of Representatives was struck out. The Braddon Clause was only to take effect for a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament otherwise provided; and a new clause was added empowering the Parliament, during the same period, to grant financial assistance to any State (sec. 96). It was also decided that the federal capital should be in New South Wales, but not within a hundred miles of Sydney. Until the new capital was decided upon, Melbourne was to be the seat of Government. The wishes of the individual States were further safeguarded with regard to the alteration of boundaries.

A new clause was also added, which had the support of the Labour Party, enabling the Constitution to be amended after a referendum, at which such alteration was approved by a majority of all the electors voting, and by a majority of the electors voting in a majority of the States.

Agreement having been at last attained, a new enabling Bill, by which a mere majority was required, was passed by the New South Wales Legislature, and federation was now approved by substantial majorities in five Colonies, Queensland at last having fallen into line. It was not till the Bill was passing through the British Parliament that Western Australia, in return for the right of imposing for five years intercolonial customs duties, threw in its lot with the rest of Australia, and the vote of the referendum adopting the Constitution was not made till after the passage of the Act through the British Parliament.

A deputation of Australian Ministers brought the Bill to England. On nearly every point Mr. Chamberlain, the Secretary of State for the Colonies, was ready and willing to adopt the measure of the Australian people; but a vigorous attempt was made to resist the provisions of the clause which abolished the right of appeal to the Privy Council in cases affecting the rights inter se of the Commonwealth and the States. The final compromise, under which such an appeal could be made if so ordered by the High Court, may be thought a surrender, because the High Court was hardly likely to question its own competence to give a final decision;[1] but the attitude taken up by the Australian Premiers and by the Ministers in London, that the Bill represented the exact arrangement upon which the Australian people had given their verdict, and that any alteration would throw the whole subject into the melting-pot, made it necessary that the Home Government should walk warily. Whatever our own inclinations toward an Imperial Court of Appeal as a link of Empire, we must recognize that it becomes valueless if not depending upon popular approval. 'Bonds which chafe', whatever their merits in other ways, can

[1] Note the emphatic language of Chief-Justice Griffith in *Baxter* v. *the Collector of Customs of New South Wales* (4 C. L. R., Part 2, 1103), claiming the competence of the High Court to be final judge in matters relating to the Commonwealth.

hardly be 'bonds which attach'; and from an Imperial standpoint the gain of a strong united Australia was worth many times the loss of some power for the Judicial Committee of the Privy Council.

The Bill passed through Parliament on July 3rd, 1900, and on January 1st, 1901, the Commonwealth of Australia entered into life.

What will be the ultimate character of the Constitution it is impossible to say. In spite of the vigorous assertion of State interests and the natural desire of State Ministers to magnify their own offices, it is possible that a generation brought up under new influences may recognize the accidental character of State divisions and attach little importance to what now seems sacrosanct. The provisions of the Act giving concurrent jurisdiction to the Commonwealth Parliament on a variety of subjects which at first belonged to the State Legislatures, and the free use which is being made of the power to amend the Constitution, afford an easy way by which the powers of the Commonwealth may wax and those of the States may wane. It is true that the great distances between the various points of Australia seem to necessitate a genuinely federal government, but science is daily achieving new wonders in the bridging of space, and British South Africa, in spite of its size, has ventured on a unitary government. These things are for Australia to settle in its own way. For us here it is enough to note that the Commonwealth Act of 1900, in the laborious care with which its every syllable was drafted, in the anxious attempts of its framers to secure unanimity, and the jealous provision made throughout its stages for its popular sanction, represents a high-water mark in democratic constitution-making of which every member of the Anglo-Saxon race, who, with whatever searching of heart and anxiety, recognizes that democracy is the inevitable goal, may well be legitimately proud.

The Union of South Africa.

We have seen how reluctantly in Canada and Australia centrifugal influences yielded before the advance of the federal principle. In South Africa a more surprising thing has happened, and men, who a few years before were opposing each other in deadly war, have succeeded in friendly co-operation in establishing the political union of British South Africa.

Here, again, it is only by some knowledge of the past history that we can understand the situation. The key-note, then, of the subsequent history will be found in the opposing methods of dealing with the natives adopted by the Dutch Colonists and by the British Government. The difference was not between opposing races. When British Colonists came out to Cape Colony, their ways of dealing with the natives did not substantially differ from those of the Dutch; and even the British Governors were found often sympathizing with Colonial methods rather than with those imposed on them from Downing Street. We have here nothing to do with the rights or the wrongs of the controversy: probably, as in most disputes, the path of wisdom lay between the two extremes. For us the only point to notice is that, because of their distrust of British methods, the more bitter of the Dutch farmers shook off the dust of British sovereignty from their feet, and sought a new home in the unknown north. The British Government, which still regarded Cape Colony of importance merely as a half-way house on the road to India, naturally shrunk from pursuing the Boers in their 'trek'. Whatever might be true in law, in the court of common sense it followed that allegiance could not be claimed where protection was no longer afforded.

Meanwhile, though the general trend of British policy was against extending responsibilities, strong men on the

spot, who already recognized that expansion was the inevitable goal, were able to force the hands of the Home Government and thus to give it an appearance of inconsistency which added to the confusion and disgust of the 'voortrekkers'. In spite, however, of the lamentable course of events which served to widen differences which need not have been great, the advantage of co-operative union among the South African Provinces was so manifest that had the matter been left to the decision of the people of South Africa some form of union would probably have been evolved.

In support of this contention may be cited the action of the people of the Orange River Colony after its annexation by Great Britain in 1848. Although that annexation was resisted by many of the Dutch, it seems clear that, after the more extreme had fled from British rule into the Transvaal, the great majority of the inhabitants quickly reconciled themselves to British rule; and, when the Home Government decided to renounce the sovereignty, its decision was regretted by the Dutch no less than by the English colonists. The fatal step having been taken of allowing the creation of independent States, the only road of safety lay in establishing some system of federation which would bind together the various portions of South Africa, at least in matters of general concern. To Sir George Grey belongs the credit of initiating this policy. Writing to the Home Government towards the close of 1856, he advocated 'a federal union amongst all these territories, in which great individual freedom of action should be left to each Province, whilst they would all be united under British rule'. He urged emphatically the necessity of a 'United South Africa under the British flag'. The Home Government unfortunately was in no mood to change the policy which had been deliberately adopted 'of recognizing by treaty the formation of independent States on the frontiers of British possessions by emigrant British

subjects, and thus raising an effectual barrier to the system of continual and indefinite expansion of the frontiers towards the interior'; and the words of wisdom of Sir George Grey fell on deaf ears. The case for some kind of federation was on its merits strong enough. The revenues derived from duties levied at Cape Town and the other Cape Colony ports were taken by Cape Colony for its sole exclusive use; while the inland States paid the additional cost on their goods, occasioned by these duties. Again, only by a federal union could the South African Colonies become so strong and so united in policy and action as to make impossible the danger of a native rising. Not only would the power and prestige of the white races be so increased by a federal union as to make the native more chary in venturing on war; but also the individual Colonies or States would become more cautious in entering upon proceedings which might result in war, when such war would need the sanction of a federal authority.

Under the policy of separation South Africa had become a land of small States, wherein petty and parochial issues filled men's minds; but federation would open out a wider horizon, along which would appear wider questions and more general interests. If Great Britain should grow weary of her burden in South Africa, federation afforded the only means by which a strong government could be erected, able to succeed to her responsibilities and to avert from the rival Provinces confusion and anarchy. By federation great individual freedom might be left to each component part, whilst for certain purposes they were united under British rule.

It is obvious that if such a federation could have been established in 1857 the whole future of South Africa would have run a different course. Mr. F. W. Reitz, the Transvaal Secretary of State at the time of the war, wrote to Sir George Grey in 1893: 'Had British Ministers in time past been wise enough to follow your advice, there would

undoubtedly be to-day a British dominion extending from Table Bay to Zambesi.'

It was part of the general ill-luck which for many years dogged the footsteps of Great Britain in South Africa that the question whether Sir George Grey was right in his policy of federation became confused with the wholly different question whether, as a Government official, he was justified in disregarding the direct instructions of the Secretary of State. Because of this disobedience he was recalled, and though, on the occasion of a change of Government in England, he was, through the intervention of the Queen, continued in office, it was on the express condition that nothing more should be said about South African federation.

Years passed in inevitable reaping of the seeds sown of disunion and distrust, yet the case for federation was so strong that the question was bound again to come to the fore. Sir Henry Barkly, the Governor of Cape Colony in 1871, expressed himself in favour of federation; and the Home Government, through Lord Kimberley, was now in cordial accord. At this time there was reason to believe that the Orange River Free State was willing to enter into such a federation. In opening the Cape Parliament in 1872 Sir H. Barkly described the difficulties in the way as not insuperable. He enlarged upon the benefits to be expected from federation in the way of uniformity of legislation, improvement of postal and railway facilities, and the promotion of a wiser and more consistent policy regarding the natives. Responsible government was now being introduced in Cape Colony, and its grant, Barkly believed, would pave the way for a redistribution of representation among the different districts, for an extension of the powers of self-government, and for eventually establishing a system of federal union, in which, sooner or later, all the Provinces of South Africa might be embraced.

In this state of things, Lord Carnarvon, who had been

Secretary of State at the time of the introduction of the British North America Act, may be forgiven if he thought the time ripe for pressing on the federation of South Africa. But he failed to remember that in Canada confederation had been a purely Canadian question, concerning which the rôle of the Imperial Government was mainly to give formal sanction to decisions arrived at by colonial statesmen. There was nothing in the experiences of 1865 and 1867 to point to the conclusion that federation could successfully be imposed from without on people suspicious and determined to manage in their own way their own affairs. Nevertheless, Lord Carnarvon, in appointing Sir Bartle Frere to the Governorship of Cape Colony, informed him that he had been selected 'to carry my scheme of confederation into effect'. It is true that Lord Carnarvon was careful to explain that he had no desire to dictate, and that the 'action of all parties, whether in the British Colonies or the Dutch States, must be spontaneous and uncontrolled'; but the seeds of distrust were already implanted in a congenial soil. The Cape Colony Government carried opposition so far as virtually to deny to the Imperial authorities any voice on the question of South African federation; and the Orange River Colony was now hostile to the measure for fear that thereby its political independence might be endangered. In this state of feeling the moment was hardly opportune for a Conference on the subject in London. The Cape Premier, who happened to be in England, was precluded from attending by a vote of the Assembly. President Brand, who was also in London, attended the Conference to discuss the native question, but was unable to take into consideration the subject of federation. Lord Carnarvon, however, was still hopeful that by friendly discussion misunderstandings might be removed, and a draft Bill for establishing a South African federation was forwarded to South Africa, so that suggestions might be made for its improvement. Some

alterations were in consequence made, and the Bill as amended was passed by the Imperial Parliament in 1877. The Act, which was merely an enabling one, followed in its main lines the provisions of the British North America Act, except that, doubtless in the interests of the natives, it gave more extensive powers to the Home Government to disallow provincial statutes. The Act was never put in force, and in 1882 ceased to have effect by efflux of time, so that its importance in the history of the subject is slight.

Meanwhile another question was coming into prominence which was to put back the clock of union for more than thirty years. At first it seemed as if the war between the Transvaal Republic and the natives was moving things in the direction of the union of South Africa; but it proved in the long run that racial jealousies between Europeans were stronger than the sense of a common peril from the natives. The annexation of the Transvaal may or may not have been at the time a necessity; it may or may not have been an act of political wisdom; but arousing as it did, at least after the first, and when the Zulu power had been put down by British arms, a fierce spirit of Dutch Afrikander patriotism, it shut the door for many years to any proposals for closer union. It is obvious that the circumstances under which the Transvaal regained its independence, and the fact that the outcome of that independence was the emergence of a powerful Republic intensely hostile to Great Britain, and ready to enter into the lists with her for the hegemony of South Africa, seemed to put off all chances of closer union to the Greek Kalends. The discovery of gold in the Rand gave to the Transvaal the sinews of war: but while reaping the full benefit of the gold mines, the Boer Republic was not willing to give to the alien population of the Rand the full rights of citizenship. Great Britain, as the paramount power, claimed to have a voice on behalf of the outlanders' claims; and though the fiasco of the Jameson raid for some time

made British statesmen slow to interfere, they at last, though reluctantly and with great misgivings, came to the conclusion that the position of Great Britain in South Africa was not compatible with the pretensions of the Boer Republic. After a war which lasted three years, and at first threatened to exhaust British resources, Great Britain found herself in undisputed possession. The old enemies, who had fought so gallantly, accepted with equal frankness the decision of the sword; and the strange spectacle was seen of the general of a hostile Republic becoming within a few years the Prime Minister under responsible government of a loyal self-governing Colony. In the Orange River Colony, as well as in the Transvaal, the Ministers under responsible government were, to a great extent, the leaders in the war against Great Britain.

With the full triumph of the principle of responsible government the fact once more became manifest that in South Africa more perhaps than in any portion of the world there are common questions of general interest which can only be decided with safety by a general authority expressing the considered judgement of a United South Africa. Such union as existed prior to the Act of last year was due to the special interference of the High Commissioner, who acted as the mediator between the different Colonies in endeavouring to facilitate arrangements and accommodations among them: but such interference was unsatisfactory from the point of view of colonial self-government, and could hardly have been exerted with success under the new system.

The three questions on which a common policy was most urgently necessary were the native question, the question of railway rates, and that of the tariff. The presence of a vast native population, which does not tend to disappear before the European advance, as the native population has disappeared in North America and Australia, makes the problem of its future one of extreme

difficulty. Different ways may be proposed for dealing with the native question; but one thing is clear, that no way can be so bad as that of dealing with them differently in the different Colonies for no other reason except that politicians are of a different mind in the various States. As Lord Selborne wrote in the impressive Memorandum issued in 1907, which has been compared with Lord Durham's Report: 'Different policies applied at the same time in different parts of the country to the same races, the members of whom are in constant communication with one another, must together defeat the object at which each severally aims. The general result is sure to be something utterly unlike what any one of them was intended to produce; and proceeding from policies which are inconsistent and causes which are uncontrolled, will be accidental if not disastrous in its effects.'

But while the native question pointed to the necessity of some kind of union, it also put a serious obstacle in its way. In Cape Colony the policy had been adopted of giving natives who fulfilled certain qualifications the right to vote for members of Parliament. In the Transvaal and the Orange River Colony there was the strongest reluctance to adopt any such course. Some friends of the natives in Cape Colony preferred indefinitely to postpone federation rather than to sacrifice the forward policy of their Colony with regard to the natives; while in the Transvaal the great majority of the people were equally determined that the natives should not be allowed to vote. Considering this cleavage of opinion, the compromise was no doubt wise which maintained, for the present, the variety of systems prevailing in the different Provinces. The decision was severely criticized in England in the interests of the aborigines; but responsible statesmen of both parties have now come to recognize that with the people of South Africa must rest the settlement of such questions, and that it is idle to expect that the British Parliament, or

even British public opinion at home, should have the controlling voice.

Closely interwoven with the native question was the labour question. The prosperity of mining, and even of agriculture, mainly depends upon the native labour which is forthcoming. A scarcity of labour which affects the mines inevitably reacts on the agricultural interest, and yet so long as British South Africa was divided into separate Colonies the labour question, which really affected South Africa as a whole, was dealt with piecemeal by separate administrations, none of which had either the opportunity or the power to deal with the question as a whole. Thus Natal had embarked upon a policy with regard to indentured Indian labour, in direct opposition to that of the other Colonies and States. The Chinese coolies for the gold-mines, about whom so much was heard, were at least limited in number; they had to be repatriated at the end of their period of indenture, and were not allowed to be engaged for any kind of labour which demanded special skill. In Natal, on the other hand, Indian coolies had been introduced without any provision for their compulsory repatriation; so that thousands remain in the Colony and have become incorporated in the social system of South Africa. At the end of their period of indenture they are free to compete in occupations of all kinds. Whereas the industry with which the Chinese were concerned is in the nature of things temporary, the richest mine becoming some time exhausted: in Natal the most permanent and fundamental industry, that of agriculture, has been established on the basis of Asiatic labour. It would of course be out of the question suddenly to overthrow a system that has taken such root; nevertheless the example of the Indian Coolie question in Natal served to show the necessity of dealing with such questions from the point of view of South Africa as a whole. 'If all South Africa were united under one Parliament', Lord

Selborne wrote, 'it is clear that when no principle of Imperial law or policy was involved, questions affecting the whole country would be settled . . . as they are settled in Canada and Australia. Such a Parliament would beget, what cannot exist without it, an informed public opinion on South African affairs. It would bring into existence a class of men throughout the country accustomed to reflect on questions as they affected it in every part.' Assuredly the solution of the question, What are to be the future relations between the Europeans and the natives of South Africa? is one which requires the whole mind and care of a United South Africa. 'The situation is startling, because it is without precedent. No reasoning man can live in South Africa and doubt that the existence *there* of a white community must, from first to last, depend upon their success or failure in finding a right solution of the coloured and native questions, or, in other words, upon the wisdom they can show in determining the relative places which the white, coloured, and native populations are to fill.'

But if the Native question, from its intrinsic importance, afforded the strongest argument in favour of South African union, the more immediate questions of the tariff and railway rates had more to do with its final triumph. The questions of the tariff and of railway rates are closely bound up together. For many years the inland States were at the mercy of the Colonies possessing seaports with regard to the duties on goods imported by sea. From 1884 onwards the Cape Colony, and from 1886 Natal, recognized the system of rebates of duties on goods entering the Orange Free State and the Transvaal. In 1889 a Customs Union was established between Cape Colony and the Orange Free State. Basutoland entered this union in 1891 and the Bechuanaland Protectorate in 1893. In 1899 a new Convention was made, to which Natal became a party; Southern Rhodesia also entering into an agreement

with Cape Colony which was of the nature of a Customs Union. Meanwhile goods to the Transvaal were allowed to pass through the territories of the coast Colonies subject to a transit rate.

After the termination of the South African War a new Customs Union, to which the Transvaal and Southern Rhodesia were parties, was set on foot. In 1905, owing to severe depression, it became necessary to secure a larger revenue from Customs, and a Conference was held in the spring of 1906 to consider the question. 'For three weeks', we are told, 'many of the busiest and most responsible persons in the country laboured incessantly, not to harmonize the programmes of the different States, for that was impossible, but to arrive at such a mixture of the various ingredients of the conflicting programmes as each and all would consent to swallow. The proceedings of the Conference were private, and when it was closed the strictest secrecy as to the nature of the results produced had still to be observed by some forty persons for several months. The new Convention had then to be carried through by different Legislatures, and each of these public Assemblies was told that it might discuss the details, but that it could not be allowed to alter one of them. The Convention was cut and dried, and they must, each and all, take or leave it as a whole.' A customs tariff framed as a treaty between independent States was of necessity a compromise, and, moreover, a compromise very probably distasteful to many who signed it; while, when a delegate was convinced by some new argument, he could not go outside the four corners of his original instructions, because the secrecy of the proceedings prevented his explaining to his fellow-countrymen the detailed history of the negotiations. The sole support of customs arrangements being faith in the diplomacy of individual delegates and not the considered judgement of a representative Assembly, there was the ever-present risk of a tariff war: the effect of which,

accompanied by a war of railway rates, would be to reduce business to a mere gamble, and perhaps to bring States as well as individuals to the verge of bankruptcy. If British South Africa was to enjoy financial equilibrium, it was clear that there must be commercial union between its various portions; but without political union commercial union must always rest on insecure foundations. On the other hand, could political union or federation be accomplished, the examples of the United States, Germany, Canada, and Australia were there to show that a corner-stone of the new building would be the security of absolute freedom of trade between the different parts. Had union not been effected, it would almost certainly have proved impossible to maintain the artificial barrier of the Customs Union. We know on good authority that General Botha, the strong Prime Minister of a people the instinct of which it is to follow its leaders, during 1908 had no little difficulty in stemming the demand of the Boer farmers for protection against competition from Cape Colony. Had the union not come about, sooner or later it is certain that there would have been a breach in the wall, and South Africa would have been exposed to the floods of a tariff war, between Colonies nominally united under a common Crown.

The question of railway rates was still more menacing, because yet more difficult. The key-note to the economic situation was that the nearest seaport to the Transvaal gold-mines was situated in Portuguese, and not British, territory. Delagoa Bay, which, under the award of Marshal MacMahon in 1875, was allotted to Portugal and not Great Britain, was some forty miles nearer to Johannesburg than was Durban, and much nearer than were the Cape Colony ports of East London and Port Elizabeth. But not only was the route shorter by way of Delagoa Bay, but also the financial profits to the Transvaal Government were far greater. Though the whole distance was less, the extent of miles over which rates were payable to the railway

company, in which the Transvaal Government was financially interested, was much greater. When to financial were added political considerations, it is obvious how useful an asset the Delagoa Bay Railway was in the hands of the Boer Republic. Before very long it seemed to have the commercial interests of all South Africa at its mercy. A Conference held in 1895 revealed the weakness of the position of Cape Colony, and an attempt to cut down rates by making use of the drifts for transport, by means of waggons, was met by the closing of the drifts, an act which was on the point of leading to war. Without the knowledge of his followers, who were members of the Afrikander Bond, Mr. Schreiner, the Cape Colony Premier, undertook that the Colony would pay half the cost, if the Imperial Government would enforce its claims even at the risk of war. The Transvaal, at the time, was not prepared for war, and yielded before the threat of coercion; but, had the Transvaal and the Cape Colony been independent States, with no Imperial power in the background, the issue might have been an armed conflict.

That the superiority of the Delagoa Bay route by no means depended upon the partiality of Boer statesmen became apparent afterwards, when the natural inclination of British public men would have been to favour British ports. An offer of one-quarter of the traffic of the Transvaal was refused by the Cape Colony Government in 1895. In 1905 the share carried by the Cape railways amounted to only 11 per cent. of the whole.

The matter was further complicated by the dependence of the Transvaal gold-mines upon native labour from the Portuguese possessions. The mining companies were given favourable terms under which they might obtain native labourers in Portuguese territory: and, in consideration of this privilege, the Portuguese authorities exacted that goods should be carried from Delagoa Bay to Johannesburg by rail, at rates which preserved the same relation to the

rates charged on goods from the British ports as existed prior to the war. Seeing that some 90 per cent. of the natives employed underground on the Rand come from the Portuguese possessions, it would obviously be a Cadmean victory to the railways of the coast Provinces if the result of their obtaining a greater share of the traffic were to be that half the stamps on the Rand could no longer be worked.

During the war the railways of the Transvaal and of the Orange River Colony were in the hands of the military authorities; and when the two Colonies were under Crown Government, Lord Milner was able to amalgamate them. Unless the railways of the inland Colonies had been united under the Intercolonial Council, they might have found themselves in some such situation as led to the closing of the drifts in 1895. 'So long as', we are told, 'the railway system of the Transvaal stood alone, its interests were as diametrically opposed to those of the Orange River Colony and Cape Colony as those of the Netherlands Railway had been. This anomalous state of affairs was the direct result of frontiers arbitrarily ruled across the map of South Africa between sections of one community, which corresponded to no real political or physical lines of division. By uniting the railways of the two Inland Colonies Lord Milner wiped out one of those lines of division, so far as transport was concerned, and created a new system, the traffic interests of which were somewhat less difficult to reconcile with those of the Cape Colony and less inseparably bound up with those of the foreign port.'

But even when the systems of the Transvaal and the Orange River Colony were united, there was still the difficulty arising from the competing systems of the Transvaal, the Cape Colony, and Natal. Lord Selborne affirmed in his Memorandum that the railway system of South Africa, although owned by States, and subject to the drawbacks of State management, was subject to many of the

defects which arise from internecine competition between competing railway companies. The various sections into which it was split up were owned not by shareholders scattered over the whole world, but by the citizens of local communities, who were kept thereby in a condition of chronic hostility towards each other. From the national point of view the result had been calamitous, for it had developed a port outside British South Africa at the expense of her own ports, and introduced the foreign complications of continental Europe into the domestic affairs of British South Africa, as shown by the fact that matters which involved the relation of one South African Colony to another had now to be dealt with by the Foreign Office of the Imperial Government.

Lord Milner recorded, as a parting word, his conviction of the supreme importance of trying to get over the conflict of State interests in the matter of railways. He urged the vital importance of settling, once for all, the basis on which all the railways could be worked as one concern, so as to end for ever the continual controversy. Nevertheless, the antagonism of interests was such as to make agreement wellnigh impossible. A Conference was summoned at Pretoria in May, 1908, to deal with the question of railway rates and that of the tariff. The members of the Conference, with singular wisdom, recognized that the only chance of a satisfactory settlement lay in the adoption of the larger measure of political union. For the time being they agreed to differ in opinion, maintaining the arrangement of 1906, till the attempt had been made to bring about such union. Public opinion in South Africa was ripe for the change. An active campaign had been carried on for some two years in favour of union, in which the Memorandum issued by Lord Selborne played a leading part. Several of the brilliant young men introduced by Lord Milner into South Africa threw themselves heart and soul into the movement. Closer Union Societies were

set on foot, and an anonymous work, *The Government of South Africa*, helped to direct vague aspirations into practicable channels. In this state of things the four Colonial Parliaments were willing to send representatives to the memorable Convention which met at Durban in the October of 1908. Mr. Brand, who acted as secretary to the Transvaal delegates, has thus described the Convention: 'Its outstanding characteristic was the preponderance of the farming element, which is everywhere supposed to be essentially conservative in its nature. Out of the thirty-three delegates, about one-third were farmers pure and simple; the interests of several of the remainder, such as Dr. Smartt and Sir Percy Fitzpatrick, lie largely in farming: and still others, such as General Smuts, Mr. Hull, Sir Henry de Villiers, and a few more, though not themselves actually engaged in farming, are directly interested in it. There were, in addition, about ten lawyers, two or three men connected with commerce and mining, two journalists, and three ex-officials.' 'Botha, Steyn, Smuts, De la Rey, and De Wet, recognized leaders of the Dutch, have, by their conduct in the struggle for independence, fully earned the confidence and trust of their people: and the qualities that sustained them in war have now been displayed for their country's benefit in the peaceful campaign for union. On the British side, too, the delegates present at the Convention were men whose natural capacities had brought them to the front in the struggles of the last ten or fifteen years. As examples it is only necessary to mention the names of Dr. Jameson, Sir George Farrar, and Sir Percy Fitzpatrick. Then there were others, 'elder statesmen' and men of South African reputation, whose long and bitter political struggles, whether in the Cape Colony or elsewhere, might well have warped their judgements, but upon whom the events of the last three or four years appear to have had a mellowing effect.'

Unlike the framers of the Australian Constitution the

delegates held their meetings in secret, so that it is impossible to know the successive steps by which the final conclusion was reached. After sitting during the month of October at Durban the Convention adjourned to Cape Town, where it completed its work by the end of the first week of February, 1909. The sittings had not been continuous; but the five weeks of vacation had been no less busily employed in the business of the new Constitution. The Bill as drafted had then to be submitted to the respective Parliaments for their approval. In the Transvaal, which had throughout taken the lead in the movement for union, the leaders on both sides were able to convince their followers of the necessity of adopting as a whole what was a carefully balanced arrangement between conflicting interests. In the other Colonies there was no such unanimity. In Cape Colony, and in the Orange River Colony, the main stone of stumbling was the provision that gave equal rights to the votes cast in urban and country constituencies. The Convention had already to some extent arrived at a compromise on the question. There was to be appointed a Commission for the delimitation of electoral divisions. Electoral divisions were to be made by dividing the total number of voters in the Province by the number of members of the House of Assembly to be returned, in such a manner as that each division should contain as nearly as was possible the same number of voters. But, in the carrying out of their duties, the Commissioners were bound to give due consideration to (*a*) community or diversity of interests; (*b*) means of communication; (*c*) physical features; (*d*) existing electoral boundaries; and (*e*) sparsity or density of population, so as, on these grounds, at their discretion to give voters in districts thus affected preferential, or differential, treatment to the extent of fifteen per cent. The Act, as first drafted, further contained a provision setting on foot a system

of proportional representation, which was distasteful to the Dutch farmers. So strong was the feeling in the Cape Parliament that the Government delegates were compelled to throw over the settlement to which they had themselves subscribed. In this state of things the decision of the question rested with General Botha and the Transvaal Dutch delegates. Had they fallen into line with their compatriots in the Cape, the cause of union must have been wrecked, inasmuch as the Transvaal Progressives were not prepared to go further in the abandonment of equal rights. Fortunately, room for compromise lay in the provisions with regard to proportional representation in the Assembly. This was jettisoned: and the Cape and Orange Free State accepted with a wry face the inroads of the Convention Bill upon the peculiar position of the agricultural interest. Proportional representation was advocated on the ground that it would tend to level up the deep cleavage between town and country, Englishman and Boer, which is still apparent. Nevertheless its abandonment was for the time inevitable.

A further stone of stumbling lay in the provisions with regard to the native vote. Upon this subject something has been already said. Certain it is that any attempt to establish a uniform franchise throughout the Union would have wrecked the chances of settlement. On this question Cape Colony stood alone, and though it might well be proud of its enlightened attitude, the provision that makes a two-thirds majority of the total number of the two Houses of Parliament necessary, at a joint sitting, before any alteration can be made in the rules now in force in Cape Colony with regard to native voters, seems amply to safeguard its own policy: while it was idle to suppose that a system wholly distasteful to them could be imposed upon the three other Colonies, to meet expectations in Cape Colony or in Great Britain. As Mr. Brand points out, the

violent criticism with which the compromise reached has been assailed by the extremists from both sides, sufficiently shows that South Africa is not yet ripe for a settlement of this question, and that a premature attempt must have ended in disaster.

The position of Natal with regard to the proposed union was wholly different from that of the other Colonies. Here the quarrel was not so much with details as with the general policy of union. The little Colony, wedged between the Drakensberg Mountains and the sea, was proud of its peculiarly British character, and feared absorption in a preponderantly Dutch South Africa. There was, therefore, considerable suspicion of union, and a federation would seem to have been more popular. Still when the question was submitted to the people by means of a *referendum* the opposition proved much less strong than had been expected. In the other Colonies the decision of the question was left to the Parliaments. The Bill, as finally submitted to them and to the electors in Natal, embodied the alterations which had been made at the final sitting of the Convention at Bloemfontein which considered the various amendments proposed by the several Parliaments. By June, 1909, the new Constitution had been accepted by all the four Colonies.

The time was not ripe for the admission of Rhodesia as a member of the Union. The Chartered Company can still, it is probable, watch over its development with greater success than could the Union Parliament or Executive. It is, however, provided, with regard to the future, that the king, with the advice of the Privy Council, may, on addresses from the Houses of Parliament of the Union, admit into the Union the territories administered by the British South Africa Company, on such terms and conditions as to representation, &c., as are expressed in the addresses and are approved by the king; and an Order in Council on these lines will have the same effect as an Act of the British

Parliament. No doubt in due time Rhodesia will enter the Union on a footing of equality with the other members.

It remains very briefly to note the character of the new Union. The short historical summary will be enough to show why the unitary was preferred to the federal form of government. In South Africa the distinction in the past has been racial, not territorial. Dutch and English existed side by side in Cape Colony, in the Transvaal, and, though in a less degree, in the Orange River Colony and Natal. The boundaries of Colonies and States have been generally artificial and accidental. The economic questions which gave the propelling force to the movement for concerted action, the question of the tariff and the question of railway rates, both pointed to the superiority of the unitary over the federal system of government. It is true that every complete federation is a union, so far as relates to the establishment of a uniform tariff: but the *vexata quaestio* of the Government railways would have presented greater difficulties had there been, as in the Commonwealth, State Parliaments with control of their State railways. Similarly, questions relating to the natives can best be decided by a single central authority.

In this state of things, with a patriotism resting on race, not on locality, and with economic considerations strongly supporting such a policy, it is no wonder that in South Africa union gained the day against federation. One important hostage had to be given to local prejudice. Although the Provincial Councils are for the most part relegated to a position of comparative inferiority, the important subjects of elementary and intermediate education remain under their control. The Dutch were unwilling to leave these subjects in the hands of the Union Parliament; and recent experience in the Orange River Colony would seem to suggest that in this direction, if anywhere, the sparks of racial antagonism may again be fanned into a flame.

A passage from Mr. Brand has been already quoted

wherein he lays emphasis on the part played by the farming interest in the foundation of the South African Union. Assuredly, throughout this Act we seem in a different atmosphere from the ultra-democratic atmosphere of the Commonwealth Constitution. Especially in the chapter dealing with the Provinces we find a note of vagueness and uncertainty which would have given rise to endless criticisms on the part of the lawyers, who weighed with such care every syllable of the Australian Constitution. What will be the exact relations between the Administration, the Provincial Councils, and the Executive Councils, he would be a bold man who should predict. Our own experience of local government in England has taught us that it is possible, when issues are fought on party lines, still to carry through the administration by means of the committee system, but the Provincial Executive Committees bear so dangerous a resemblance to ministries under the system of responsible government, that their election by the Provincial Councils under proportional representation seems to suggest a medley wherein Swiss and English precedents have neither been sufficiently powerful to strike the key-note. Consider, again, the curious subsection which gives to the Union Ministry the deciding voice as to whether a matter is "of a purely local or private nature,"[1] so as to come within the jurisdiction of the Provincial Councils. The fact that the whole provincial system is at the mercy of the Union Parliament, except so far as the Provincial Councils are given for five years the control of education, other than higher, points to the provisional and experimental character of the whole chapter; but, as Mr. Brand shrewdly remarks, institutions, once set up, have a way of striking root. After all, responsible government, as we understand it, is a peculiarly British system; and it is possible that the Provincial Councils and Committees, as sketched in the Act, may very

[1] Sec. 85, subsection xii.

well answer the needs and ideas of the Dutch inhabitants of the South African Union.

One other point should be mentioned. It is probable that nothing did so much to dispel suspicions and to promote the cause of union as the prompt readiness of the English delegates to recognize the complete equality of the Dutch language in all official proceedings. Section 137 of the Act runs: 'Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges. All records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.' It is a matter for sober congratulation that this provision was not extorted grudgingly or in return for something else after that its justice had once become apparent to the English delegates.

Accordingly, largely owing to the high character and the unswerving loyalty to the main end displayed by both the Dutch and English delegates, the crowning mercy was won; and British South Africa enters on a new future with happier auspices than have, in the past, surrounded that country which, if it has not always been the grave of reputations, has at least given the recording angel of past policies theme for lamentation.

Conclusion.

Having dealt, however inadequately and succinctly, with the circumstances under which these new Constitutions took their rise, and having commented on a few of their leading features, it only remains to compare very briefly the different types of government which have thus come into existence.

In the first place the three Constitutions resemble each other in this, that they all follow the British precedent in recognizing, though not in express terms, the system of

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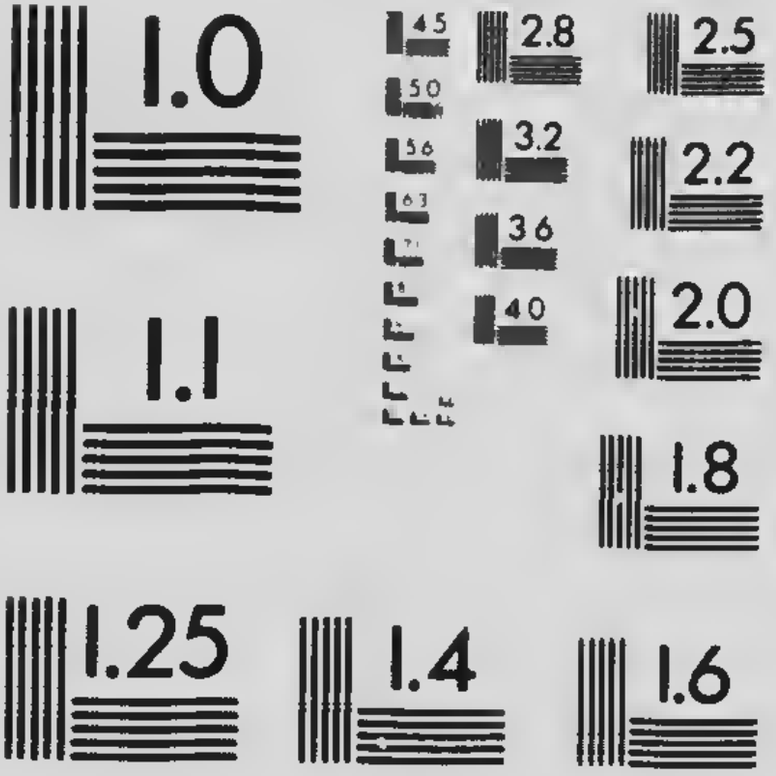

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responsible government. In Canada the system is adopted throughout; and applies no less to the Provincial than to the Central Governments. In Australia there is some doubt as to the manner of its working, through the prominence given by the federal principle to the Senate; but, should difficulty arise through the strength of the Second Chamber, the equality of the Senate (except on questions of finance) would probably be sacrificed sooner than that the system of responsible government should be imperilled. In South Africa, as we have seen, it has not been attempted to employ responsible government in the administration of the Provinces; and generally, owing to the absence of a federal Constitution, and the consequent subordination of the Senate, the system of government more closely approximates to that of Great Britain than does that of either Canada or Australia.

The South African Act follows the Australian in rendering compulsory the sitting of Ministers in Parliament, but the unwritten convention, in Canada and in Great Britain, leads to the same result; so that the former statutes only dot the i's of the prevailing practice.

Herein a wide gulf separates these Constitutions from that of the United States. In that Constitution the spheres of the executive, the legislative and the judicial authorities are kept strictly separate. The American Constitution was framed on the model of the English Constitution as conceived by Montesquieu, and sought to reproduce the English model, freed from parasitic accretions which were ascribed to the poisoning influence of the Crown. But the distinction between Parliamentary and non-Parliamentary executives is fundamental, and the absence in the United States of the connecting link of the Cabinet between the executive and the legislature causes the American Constitution to run in a wholly different channel from the one followed by those Constitutions which accept the English system of government by a parliamentary Cabinet.

In another feature the Constitutions of Canada and

Australia may be contrasted with the American. The more recent State Constitutions give more direct expression to the distrust, which was apparent from the first in the United States, shown by the people of its own agents and officers as well as of the legislature. No such distrust has been shown by the people of Canada and Australia. Under a federal system there cannot obviously be that complete sovereignty of Parliament which is characteristic of the British system: and a legislature which is subordinate—however nominal may be that subordination in the case of the self-governing Dominions—cannot claim complete sovereignty. But within these limitations the Constitution of Canada divides powers between the central and the Provincial Parliaments: and though the Australian Constitution makes freer use of the intervention of the popular vote, the motive at work is the exigencies of a system at once federal and democratic, and not distrust of the Parliament.[1]

The Anglo-Saxon federations stand in striking contrast to European continental federations such as the German and the Swiss. In the former, in all matters which fall within the sphere of the federal courts the central government executes by means of its own officials its own laws. The opposite system, under which federal laws must depend for their execution upon State or Canton officials, has not commended itself to the Anglo-Saxon mind.

As is to be expected, the South African Constitution, not being a federal compact, is more easily altered than are the Canadian and the Australian. But the contrast is noteworthy between the blind trust of the Canadians, shown in the sixties, in the wisdom of the British Parliament, and the scrupulous care with which the framers of the Australian Constitution arranged that every proposed

[1] It may be noted, however, that even in England there is developing a certain distrust of an all-powerful House of Commons which is shown by the demand for the Referendum.

change should be the deliberate choice not only of the majority of the people of the Commonwealth, but also of a majority of the people voting in a majority of the States.

Something has already been said and more will be found in the notes on the question of the allocation of powers between the central and the local authorities. At the two extremes, Australia and South Africa occupy positions at once intelligible and logical. The price paid for the entrance into a federation of Colonies, jealously proud of their separate local life, was the maintenance of their separate colonial institutions, so far as they did not conflict with the exigencies of the United Commonwealth. Hence the paraphernalia of State Governors, appointed still by the Crown, the meetings of State Premiers to discuss common State interests, and the demand, laughed indeed out of court, but none the less put forward, that the State Premiers should have a *locus standi* at Imperial Conferences. Time alone can show how far such considerations will avail should the unreality of local distinctions be once realized: but so far as outsiders can understand, the triumph of the Labour Party at the general election of 1910 was, to no little degree a triumph of centripetal tendencies over centrifugal. The land and labour policies advocated by the Labour Party involve inevitably a serious invasion upon the preserves of the State Parliaments. While, then, we clearly recognize why Australia followed the example of the United States and not that of Canada in making the States and not the Commonwealth Parliament the holder of the residuary powers not specifically allotted to either authority: it seems clear that by the exertion of its concurrent powers, and by the amendment of the Constitution, the Commonwealth Parliament will more and more grow in importance at the expense of the States.

With Canada the case was precisely the opposite. Something has been already said concerning the strong

sympathies of John A. Macdonald in favour of unitary government. But another fact, the full significance of which has perhaps been somewhat neglected, worked in the same direction. However different may have been the character of French Quebec from that of British Ontario, still the fact remained that, for better or for worse, they had for more than thirty years been governed by a single Parliament. It was thus possible to represent the Confederation measure as really a measure of disunion and disruption; and when in fact this line was taken by some of the most acute critics of the proposal, the moment was hardly opportune for a yet more vigorous assertion of provincial rights. When it is remembered that only four Colonies entered the original union; that the two Canadas greatly outweighed the other two in wealth and importance, and that those two were at the time parts of a common whole, in the letter if not in the spirit of the law, the general conclusion reached is not to be wondered at. Moreover, as has already been intimated, the example of the American Civil War was there to point to the dangers of an equivocal union. At the same time, essential distinctions were much deeper rooted in the Dominion than in Australia or in South Africa; so that it is no cause for surprise that, when once it became apparent that the extreme meticulousness of the framers of the Constitution had overreached itself, provincial patriotism flourished vigorously under the fostering care of judicial decisions. Enough has been already said on the curious power given to the Dominion Executive to disallow Provincial Acts of Parliament, as well as of the theoretical subserviency of the Provincial Lieutenant-Governors to that Executive; but these things, no more than the elaborate subsections of Section 91 of the British North America Act, are not sufficient to prevent provincial feelings from finding, under provincial responsible government, vigorous and adequate expression.

Mr. Bryce appends to an eloquent eulogy of the work of

Chief-Justice Marshall, in bringing to the light the implied powers contained in the American Constitution, a note which says: 'Had the Supreme Court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the Privy Council has recently applied to the construction of the British North America Act, 1867, the United States Constitution would never have grown to what it now is.'[1] One hesitates to differ from Plato; but surely the fault, if fault there was, lay with the framers of the British North America Act and not with its interpreters. The doctrine of implied powers was justified by the extreme generality of the language of the American Constitution. When, for better or for worse, the Canadian statesmen had attempted to deal with every possible case in extreme minuteness of detail, no room was left for the application of the general doctrine. In the language of the judgement in *The Lambe Cases* (12 Ap. Cas. 575), 'It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an Act of Parliament, which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated Provinces a carefully balanced Constitution under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General. And the question they have to answer is, whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.'

The framers of the Canadian Constitution cannot be blamed that, with the example of that of the United States before them, they determined to make the Central Parlia-

[1] *The American Constitution*, 3rd ed., 1895, vol. i, p. 385.

ment the final depository of power. It was clearly right that such subjects as the criminal law and divorce should be controlled by the Dominion Legislature, being matters of national, not local concern. None the less was the manner unfortunate in which the intention was carried into effect. It would have been easy to enumerate certain subjects, such as the fifteen set forth in Section 92, and to say that these, in so far as they referred merely to provincial or local concerns, should be dealt with by the Provincial Legislatures, with the proviso that, if a Dominion Statute subsequently dealt on general lines with a subject already dealt with by a Provincial Statute, in case of conflict the former should prevail. It will be seen that, in the case of the Commonwealth Statute, the difficulty of the rivalry between the Central and the State Legislatures was successfully surmounted by conferring concurrent powers, with such predominance on the part of the Commonwealth Parliament in case of conflict. Instead of pursuing this straight course, as easy if the residuum of powers were to be left to the Dominion as if they were to be left to the Provinces, the British North America Act, while containing in its express language the clue that laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned to the Provincial Legislatures could only be made by the Dominion Parliament, and the further clue that the *raison d'être* of the fifteen assigned subjects was that they were 'matters of a merely local or private nature in the province', went on to befog the subject by an elaborate enumeration of twenty-nine separate subjects over which the central authority has exclusive jurisdiction, these subjects in many cases seeming dangerously to overlap the other subjects assigned to the Provincial Legislatures. Take the subject of taxation. It would have been easy to say that, while taxation for national purposes belonged to the Dominion, the Provinces could raise money by taxation

for local purposes, so long as they did not interfere with the general customs duties in force throughout the Dominion. Instead, 'the raising of money by any mode or system of taxation' is given to the Dominion; but the Provinces have control over 'direct taxation within the Provinces in order to the raising of a revenue for provincial purposes'; and over 'shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes'. Consequently, the Courts have found themselves confronted with cases often of extreme complexity and subtlety, regarding the question whether some tax is really direct or indirect.

The most conspicuous example of the confusion caused by the extreme minuteness of the language employed has perhaps been afforded by the body of cases regarding the temperance laws in Canada. It is clear that the Dominion Parliament has authority to pass a general Temperance Act under its powers 'to make laws for the peace, order, and good government of the Dominion', notwithstanding that such laws may seem to conflict with the 'property and civil rights in the provinces', reserved to the Provincial Legislatures. But a Provincial Legislature can equally make regulations of a merely local character, such as are calculated to preserve in the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. Such laws relate to municipal institutions in the Province and do not interfere with the general 'regulation of trade and commerce', which belongs to the Dominion Legislature.

The extreme difficulty in the way of knowing the law is illustrated by comparing the cases of *Russell* v. *the Queen*[1] and *The Governor-General of the Dominion* v. *The Four Provinces*.[2] The former held that the enactment of a general temperance law by a Dominion Parliament was within its powers; but the latter shows that such a law

[1] Cartwright. *Cases under the British North America Act*, vol. ii, pp. 12-26.
[2] *Ibid*, vol. iv, cited in note on p. 342.

is invalid, if it is in effect an invasion of the municipal institutions assigned exclusively to the Province.

Again, the language is surely somewhat unfortunate which assigns 'marriage and divorce' to one authority, and the 'solemnization of marriage in the Province' to the other. The intention apparently was that all matters relating to the *status* of marriage should belong to the Dominion, while the procedure by means of which that *status* was brought about should be a matter of provincial control: but the meaning is by no means evident at first sight. Nor can a Statute be praised on the ground of simplicity, in which 'bankruptcy and insolvency' belong to one authority, and an assignment for the general benefit of creditors to another: on the ground that the latter subject belongs to 'property and civil rights in the Province'.

These, however, are rather matters for lawyers, though it is necessary to point out that the objects at which the British North America Act aimed might perhaps have been reached with less demands upon the ingenuity of counsel and of judges; whilst the lucidity and directness of Section 51 of the Commonwealth Act might have been equally manifest if the residuum of powers had rested with the Central and not with the State Parliaments. The unitary character of the South African Constitution makes the assignment of subjects to the Provincial Councils a comparatively easy task; though even here the exigencies of racial prejudices have brought about that one subject of a specially general character, namely elementary education, is assigned to these humbler bodies.

Of the character of the three Parliaments, as apart from their functions, it is unnecessary to say much. The three popular assemblies are all democratic bodies, instituted in such a way as to give full expression to the voice of the majority. But here again there is the apparent paradox that, whereas in the federations of Canada and Australia the principle of plurality of votes in the nation as a whole carries

the day, in the unitary system of South Africa deference is paid to the principle of provincial representation by giving to Natal and the Orange Free State Province a somewhat larger proportion of members than they could claim on the ground of their population, although, as the proportion of members allotted to the different parts will be modified according to the results of each census, the intention apparently is that this original advantage shall not be continued.

So much has of late been said and written about the colonial Second Chambers that little need here be added. We have seen that, if the intention was to give effect to the federal idea, the Canadian Senate was a failure; and that it was no less a failure if the hope was to set on foot a strong independent Second Chamber. We have seen that on paper the Australian Senate appeared to be an admirable embodiment of the federal principle. In its workings, however, as coming under the influence of the organizations that can best cover the area of a vast constituency, it seems to be a bulwark rather of labour interests than of those of the separate States: and, whatever its merits in other ways, a Second Chamber can hardly be championed from the standpoint of those who desire it to give expression to sober second thoughts, at an election for which not a single seat of those becoming vacant was won by any candidate not supporting the complete programme of the Labour party. The most conservative of the Australian founders of the Commonwealth were many of them the advocates of State rights, and in their zeal for the due representation of such rights were perhaps less careful of the traditional function of a Second Chamber. The South African Senate, stands in a half-way house between the Australian and the Canadian: being for the most part elected, but partly nominated. Moreover, its mode of election follows American and not Australian precedents; and, as part of a unitary system, the South African Senate is, as has already been explained, inevitably weak.

With regard to methods of preventing a deadlock between the two Houses, the Canadian Statute may be said to belong to a pre-scientific epoch. As originally drafted it entails no provision to this effect at all, and the limited power given by the Act of adding, if necessary, six additional senators, will in the event of a real deadlock be a very Mother Partington's mop. The different methods adopted by the Commonwealth and the South African Act reflect the different character of their Second Chambers.

The Australian Senate, being based on the idea of at least a partial equality, can force a general election before at a joint sitting it yields to superior numbers. In South Africa, on the other hand, the method of a joint sitting can be employed without the intervention of a popular vote; while instead of a half, the Senate consists of only one-third of the popular assembly. Similarly, the Australian is the only one of the three Constitutions which directly adopted the principle of the Swiss referendum: though it should be noted that free use has been made of the principle of the direct popular vote in Canada on the temperance question.

Both the later Statutes showed more capacity than their predecessor, in establishing as part of the original foundation a High Court of Justice for the new systems of government. We shall see that it was not till 1875 that effect was given to the clause in the British North America Act enabling the Canadian Parliament to establish a Court of Appeal for Canada. As was to be expected, the most democratic of the three Constitutions has gone furthest, at least on questions relating to the Constitution, in the road of independence of the Imperial Privy Council.

These are a few of the points of difference and similarity between these three Constitutions; it is unnecessary to anticipate conclusions which the student of the text before him, should draw for himself. Behind and beyond these apparent differences and similarities, it must always be remembered there was this fundamental point in

common—that, at a certain stage of their political and economic development, each one of these communities found it necessary to give to their growing sense of common nationhood the outward expression of a common Constitution; that each is a marvellous amalgam of ancient precedents and new experiments, so that, were the British Empire to follow the fate of its predecessors, its memory would still, if for nothing else, always survive; because, although indirectly and mediately, it has, like the wise householder, brought forth things new and old.

It is natural in turning from these examples of the success of the Anglo Saxon race in the work of achieving greater union to ask oneself what light or leading these precedents afford to those who believe that only by a more systematic method of cohesion can the separate portions of the British Empire be prevented from, sooner or later, drifting apart. Assuredly the difficulties in the way are great. Though the need of closer union is now more clearly realized than at any previous date, few would now suppo-t the simple proposal of converting the present Parliament into a Parliament of the Empire by giving representatives to the oversea Dominions and Colonies. Moreover, the *vis inertiæ* which naturally opposes change is still powerful. It was only the compelling force of necessity, the recognition of the fact that without union existence itself might become impossible, which persuaded the jealous American States to accept the Constitution imposed on them by the genius of Hamilton and the character of Washington. But to the masses in the British Empire, who dictate under democracy the policy of governments, the necessity for closer union is, as yet, far from clear. In Canada the fact that a union, though an uneasy one, already existed between the French and English of Lower Canada, made easier the foundation of the Dominion. In Australia and South Africa the boundaries between the various Colonies were, for the most part, arbitrary and fortuitous. In broad contrast

with the United States after the War of Independence, and with the Dominion, the Commonwealth, and the Union of British South Africa, the British Empire has already reached a stage of development at which its component parts consist of communities with most of the attributes of distinct nations. The most keen-sighted of imperialists now recognize that what is necessary is a federation of nations, not of provinces. In this state of things past precedents count for very little: and a new form of Constitution must needs be evolved to meet a condition of affairs wholly new. A consensus of opinion seems to regard the Imperial Conference as the point of departure, from which may be evolved a more systematic organization of the Empire. But the British Empire of which Lord Salisbury spoke has not yet risen from the sea, and the consideration of its probable form still belongs to the field of speculation and theory. Meanwhile all that we can say with regard to the precedents of the past is that if they teach no practical lesson, at least they are of excellent omen as showing the spirit and the temper in which the problem should be approached.

ARTICLES OF CONFEDERATION

BETWIXT THE PLANTATIONS UNDER THE GOVERNMENT OF THE MASSACUSETTS, THE PLANTATIONS UNDER THE GOVERNMENT OF NEW PLYMOUTH, THE PLANTATIONS UNDER THE GOVERNMENT OF CONECTICUTT, AND THE GOVERNMENT OF NEWHAVEN, WITH THE PLANTATIONS IN COMBINATION WITH ITT.[1]

[The text is as given in *New Haven Colonial Records*, 1638-1649. Edited by C. J. Hoadby. Hartford, 1857; pp. 98-104.]

WHEREAS we all came into these parts of America with one and the same end and ayme, namely, to advance the kingdome of our Lord Jesus Christ, and to enjoy the libertyes of the Gospell, in purity with peace;[2] and whereas in our settling (by a wise providence of God) we are further dispersed upon the sea-coasts and rivers then was at first intended,[3] so thatt wee cannott (according to our desire) with conveniencie communicate in one government and jurisdiction; and whereas we live incompassed with people of severall nations and strange languages which hereafter may prove injurious to us and our posterity:[4] and forasmuch as the natives have formerly comitted sundry insolencies and outrages upon severall plantations of the English and have of late combined against us[5] and seeing, by reason of the sad distractions in England, which they have heard of, and by which they know we are hindered both from thatt humble way of seeking advice, and reaping those

[1] No stress is to be laid upon the fact that the agreement was in form between the Plantations of the Governments and not the Governments themselves.

[2] The aim of the New English settlers was not so much *idem velle de re publica* as *idem velle de rebus sacris*.

[3] These words allude to the separate foundation of Plymouth and Massachusetts, and to the further dislocation caused by the foundation of Connecticut and New Haven.

[4] The French and the Dutch.

[5] After the destruction of the Pequot Indians there was at this time no serious risk of an Indian combination against the English.

comfortable frutes of protection, which att other times we might well expect.[1] We therefore doe conceive itt our bounden dutye without delay to enter into a present consociation amongst ourselves for mutuall help and strength in all our future concernments, thatt, as in nation and religion, so, in other respects, we bee and continue one, according to the tennure and true meaning of the ensueing articles.

I. Wherefore itt is fully agreed and concluded by and betweene the partyes, or jurisdictions above named, and they joyntly and severally doe by these presents agree and conclude thatt they all be, and henceforth be called by the name of The United Collonyes of New England.

II. The said United Colonyes for themselves and their posteritye doe joyntly and severally hereby enter into a firme and perpetuall leage of frendship and amyty, for offence and defence, mutuall advice and succour, upon all just occasions, both for preserving and propageating the truth and libertyes of the Gospell, and for their owne mutuall safety and wellfare.

III. Itt is further agreed thatt the plantations, which att present are or hereafter shall be settled within the lymitts of the Massacusetts shall be forever under the government of the Massachusetts: and shall have peculiar jurisdiction amongst themselves in all cases as a entire body; and thatt Plymouth, Conectecut, and Newhaven shall, each of them, in all respects have the like peculiar jurisdiction and government within their limmitts; and in referrence to the plantations which allready are settled or shall hereafter be erected, and shall settle, within any of their lymmits respectively, provided, thatt no other jurisdiction shall hereafter be taken in as a distinct head or member of this conforderation, nor shall any other, either plantation or jurisdiction in present

[1] It is impossible to say how far these words were written in earnest; the people of New England assuredly never showed any desire that England should interfere with their local concerns.

being and nott already in combination or under the jurisdiction of any of these confederates, be received by any of them, nor shall any two of these confederates joyne in one jurisdiction without consent of the rest,[1] which consent to be interpreted as in the sixt ensuing article is expressed.

IV. Itt is allso by these confederates agreed thatt the charge of all just warres, whether offensive or defensive, upon whatt part or member of this confederation soever they fall, shall both in men, provisions, and all other disbursments, be borne by all the parts of this confederation in different proportions according to their different abilityes in manner following, Thatt the commissioners for each jurisdiction from time to time as there shallbe occasion bring a true account and number of all the males in each plantation or any way belonging to or under their severall jurisdictions, of whatt quality or condition soever they be, from sixteene yeares olde to three score, being inhabitants there, and thatt according to the different numbers, which from time to time shall be found in each jurisdiction, upon a true and just account, ye service of men and all charges of the warre be borne by the pole: each Plantation or Jurisdiction being left to their owne just course and custome of rateing themselves, and people, according to their different estates, with due respect to their quallityes and exemptions among themselves, though the confederation take no notice of any such priviledg. And thatt according to the different charge of each jurisdiction and plantation, the whole advantage of the warre (if it please God so to blesse their endeavours), whether itt be in lands, goods or persons, shall be proportionably divided among the said confederates.

V. Itt is further agreed thatt if any of these jurisdictions, or any plantation under or in combination with them be invaded by any enemy whomsoever, upon notice and request of any three magistrates of thatt jurisdiction so invaded, the rest of the confederates without any further meeting

[1] See Introduction for cynical disregard of this Article by Connecticut.

or expostulation shall forthwith send ayde to the confederate in danger, but in different proportions, namely the Massacussets one hundred men sufficiently armed and provided for such a service and journay, and each of the rest forty-five men, so armed and provided, or any lesse number, if lesse be required, according to this proportion. Butt if such a confederate in danger may be supplyed by their next confederate, nott exceeding the number hereby agreed, they may crave help there and seeke no further for the present, the charge to be borne as in this article is expressed, and att their retourne to be victualled and supplyed with powder and shott (if there be need) for their journay by thatt jurisdiction which imployed or sent for them, but none of the jurisdictions to exceed these numbers, till by a meeting of the commissioners for this confederation a greater ayde appeare necessary. And this proportion to continue till upon knowledge of the numbers in each jurisdiction, (which shall be brought to the next meeting,) some other proportion be ordered, but in any such case of sending men for present ayde, whether before or after such order or alteration, it is agreed thatt att the meeting of the commissioners for this confederation, the cause of such warre or invasion be duely considered and if itt appeare that the fault lay in the party so invaded, thatt then thatt juri diction or plantation make just satisfaction both to the invaders, whome they have injured, and beare all the charges of the ware themselves, without requireing any allowance from the rest of the confederats towards the same. And further; if any jurisdiction see any danger of an invasion approaching, and there be time for a meeting, that in such case three magistrates of thatt jurisdiction may summon a meeting att such convenient place as themselves shall thinke meete, to consider and provide against the threatned danger. Provided, when they are mett, they may remove to whatt place they please, onely, while any of these fower confederates have but 3 magistrates in their jurisdiction,

a request or summons from any two of them shall be accounted of equall force with the three mentioned in both the clauses of this article, till there be an increase of magistrates there.

VI. Itt is allso agreed thatt for the managing and concluding of all affayres proper to and concerning the whole confederation two commissioners shall be chosen by and out of these foure jurisdictions, namely two for the Massacusetts, two for Plymouth, two for Conecteeutt, and two for Newhaven, being all in church fellowship with us, which shall bring full power from their severall Generall Courts respectively to heare, examine, weigh and determine all affaires of ware, or peace, leags, aydes, charges and numbers of men for ware, division of spoyles, or whatsoever is gotten by conquest, receiving of more confederates, or plantations, into combination with any of these confederates, and all things of like nature which are the proper concomitants or consequents of such a confederation, for amyty, offence[1] or deffence, nott intermedling with the government of any of the jurisdictions which by the third article is preserved intirely to themselves.

But if these eight commissioners, when they meete, shall note all agree, yett it is concluded thatt any six of the eight agreeing shall have power to settle and determine the busines in question. Butt if six doe not agree, thatt then such propositions with their reasons, so farre as they have beene debated, be sent and referred to the fowr Generall Courts, (viz.) the Massacusetts, Plymouth, Conecteeutt and New haven. And if at all the said Generall Courts the busines so referred be concluded, then to be prosecuted by the confederates and all their members. Itt is further agreed thatt these eight commissioners shall meete once every yeare, besides extraordinary meetings according to

[1] It seems strange that in the face of this Article Massachusetts could, even for a time, maintain that the Commissioners had no authority to undertake an offensive war.

the fifth article, to consider, treate, and conclude of all affayres belonging to this confederation, which meeting shall ever be the first Thursday in September, and thatt the next meeting after the date of these presents, which shall be accounted the second meeting, shall be att Boston in the Massacusetts, the third att Hartforde, the fowerth att New haven, the fifth att Plymouth, the sixt and seaventh att Boston, and then att Hartforde, New haven and Plymouth and so in course successively, if in the meane time some middle place be nott found out and agreed on, which may be comodious for all the jurisdictions.

VII. Itt is further agreed thatt att each meeting of these eight commissioners, whether ordinary or extraordinary, they all of them, or any six of them agreeing as before, may chuse their president out of themselves, whose office and worke shalbe to direct for order and a comely carrying on of all proceedings in the present meeting, but he shalbe invested with no such power or respect as by which he shall hinder the propounding or progresse of any busines, or any way cast the skales otherwise then in the presedent article is agreed.

VIII. Itt is allso agreed thatt the commissioners for this confederation hereafter att their meetings, whether ordinary or extraordinary, as they may have commission or oportunity, doe endeavour to frame and establish agreements and orders in generall cases of a civill nature wherein all the plantations are interessed for preserving peace amongst themselves, and preventing (as much as may be) all occasions of warre, or differences with others as about the free and speedy passage of justice in each jurisdiction to all the confoederates equally, as to their owne, not receiving those that remove from one plantation to another without due certificates; how all the jurisdictions may carry itt towards the Indians thatt they neither grow insolent, nor be injured without due satisfaction, least warre breake in upon the confoederates through such miscarryages. Itt is allso agreed

thatt if any servant run away from his master into any other of these confederated jurisdictions thatt in such case, upon the certificate of one magistrate in the jurisdiction, out of which the said servant fled, or upon other due proofe, the said servant shall be delivered to his said master, or to any other thatt pursues, and brings such certificate or proofe, and thatt upon the escape of any prisoner whatsoever or fugitive for any criminall cause, whether breaking prison or getting from the officer, or otherwise escapeing, upon the certificate of two magistrates of the jurisdiction, out of which the escape is made, thatt he was a prisoner or such an offender att the time of the escape, the magistrates, or some of them, of thatt jurisdiction where for the present the said prisoner or fugitive abideth shall forthwith grant such a warrant as the case will beare, for the apprehending of any such person and the delivery of him into the hand of the officer or other person who pursueth him, and if there be help required for the safe retourning of any such offender, then itt shall be granted unto him thatt craves itt, he paying the charges thereof.[1]

IX. And for thatt the justest warres may be of dangerous consequence especially to the smaller plantations in these united collonyes, itt is agreed thatt neither Massacusetts, Plymouth, Conecteeutt, nor New haven, nor any of the members of any of them, shall att any time hereafter begin, undertake or ingage themselves, or this confederation, or any part thereof, in any warre whatsoever (sudden exegents with the necessary consequences thereof excepted, which are

[1] The mischief aimed at by this Article was met by Article IV. Sections 2 & 3, of the United States Constitution. A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

No person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

allso to be moderated as much as the case will permit) without the consent an.' ;reement of the forenamed eight commissioners, or att least six of them, as in the sixt article is provided, and thatt no charge be required of any of the confoederates in case of a defensive warre, till the said commissioners have mett and approved the justice of the warre and have agreed upon the sums of mony to be leivied; which sum is then to be payd by the severall confoederates, in proportion, according to the fowerth article.

X. Thatt in extraordinary occasions when meetings are summoned by three magistrates of any jurisdiction, or two as in the fift article, if any of the comissioners come not, due warning being given or sent, itt is agreed thatt fower of the commissioners shall have power to direct a warre which cannot be delayed, and to send for due proportions of men out of each jurisdiction, as well as six might doe, if all mett; but nott less than six shall determine the justice of the warre, or allow the demands or bills or charges, or cause any levies to be made for the same.

XI. Itt is further agreed thatt if any of the confoederates shall hereafter breake any of these present articles, or be any other way injurious to any one of the other jurisdictions, such breach of agreement or injury shall be duely considered, and ordered by the commissioners for the other jurisdictions, that both peace, and this present confoederation, may be intyrely preserved without violation.

XII. Lastly. This perpetuall confoederation, and the severall articles and agreements thereof being reade and seriously considered both by the Generall Court for the Massacusetts, and by the commissioners for Plymouth, Conecte-cutt and New haven were fully allowed and confirmed by three of the forenamed confoederates, namely, the Massacusetts, Conectecut, and Newhaven. Onely the comissioners from Plymouth, haveing noe comission to conclude, desired respite till they might advise with their Generall Court, Whereupon itt was agreed and concluded by the

said Court of the Massacusetts, and the comissioners for the other two confederates, that, if Plymouth consent, then the whole treaty, as it stands in these present articles, is and shall continue firme and stable, without alteration; Butt, if Plymouth come nott in, yett the other three confederates doe, by these presents, conclude the whole confederation and all the articles theof, onely in September next, when the second meeting of the comissioners is to be att Boston, new considerations may be taken of the Sixt article, which concerns number of comissioners for meeting and concluding the affayres of this confederation, to the satisfaction of the court of the Massacusetts, and the comissioners for the other two confederates, butt the rest to stand unquestioned. In testimony whereof the Generall Court of the Massacusetts by their Secretary and the Commissioners for Conecteeutt and Newhaven have subscribed these present articles this 19th day of the third moneth, comonly called May, 1643.[1]

[1] The General Court of Plymouth duly ratified the action of their Commissioners on August 29, 1643, and these Articles were signed by them on September 7. See *New Plymouth Records*, ed. by N. B. Shurtleff and D. Pulsifer, vol. ix, p 8. Boston, 1859.

MR. PENN'S PLAN FOR A UNION OF THE COLONIES IN AMERICA

[The text is as given in O'Callaghan's *Documents Relating to the Colonial History of New York*, vol. iv. pp. 296–7. The plan is summarized in Fortescue's *Calendar of State Papers, Colonial Series, America and West Indies*, 1696–7, No. 694. It was read by Board of Trade Feb. 8, 1696–7.]

A BRIEFE and plaine scheam how the English Colonies in the North parts of America, viz. Boston, Connecticut, Road Island, New York, New Jerseys, Pensilvania, Maryland, Virginia and Carolina may be made more usefull to the Crowne, and one anothers peace and safty with an universall concurrence.

1. That the severall colonies before mentioned do meet once a year, and oftener if need be during the war, and at least once in two years in times of peace by their stated and appointed deputies, to debate and resolve of such measures as are most adviseable for their better understanding and the public tranqnility and safety.

2. That in order to it two persons well qualified for sence, sobriety, and substance be appointed by each Province as their Representatives or Deputies, which in the whole make the Congress to consist of twenty persons.

3. That the King's Commissioner for that purpose specially appointed shall have the chaire and preside in the said Congresse.

4. That they shall meet as near as conveniently may be to the most centrall Colony for ease of the Deputies.

5. Since that may in all probability be New York, because it is now the center of the Colonies, and for that it is a frontier and in the King's nomination, the Governor of that Colony may also be the King's High Commissioner during the session after the manner of Scotland.

6. That their business shall be to hear and adjust all matters of complaint or difference between Province and Province. As (1st) where persones quit their own Province

and goe to another, that they may avoid their just debts[1] though they be able to pay them. (2.) Where offenders fly Justice,[2] or Justice cannot well be had upon such offenders in the Provinces that entertaine them. (3.) To prevent or cure injuries in point of commerce.[3] (4.) To consider of ways and means to support the union and safety of these Provinces against the publick enemies. In which Congresse the quotas of men and charges will be much easier and more easily sett,[4] then it is possible for any establishment made here to do: for the Provinces knowing their own condition and one anothers can debate that matter with more freedom and satisfaction and be adjust and ballance their affairs in all respects for t common safty.

7. That in times of war the King's High Commissi shall be Generall or Chief Commander of the sev Quotas upon service against the common enemy as shall be advised, for the good and benefit of the whole

[1] In some further heads of things proper for the Plantations, dra by Penn in 1700, when he perhaps despaired of his more ambi scheme being adopted, he proposed: 'For prevention of runaways and covers and fraudulent debtors, from one Province to another f r shelter, it shall be recommend Governments to make law with the same restrictions and pen if the whole were bu Government.' (Headlam's *Calendar of S Papers, Colonial Series, and West Indi* 1700, No. 845, xxxii.)

[2] An extreme case of the mischief against which Penn's pr was directed, may be found in the North Carolina Statute of which enacted that none should be sued for five years for any caus action arising out of the country, and that none should receive a power attorney to receive debts contracted abroad. (*Political Annals of the Present United Colonies*, by G. Chalmers, p. 525.) We find Lord Bellomont, the Governor of New York, writing in 1699 that he had prevailed on the Governor of Connecticut to seize and send to New York Thomas Clarke of that city, a companion of Kidd the pirate. Clarke, thinking himself safe from Bellomont's power, wrote a very saucy letter bidding him defiance. (*Documents relating to the Colonial History of New York*, vol. iv. p. 595.)

[3] This was no doubt thrown in to placate the Board of Trade. The English Customs Officer, Quarry, had complained greatly of the breaches of the Navigation Act in Pennsylvania.

[4] The various quotas might be more fairly assessed by a Federal Congress than by the Board of Trade at home; but Penn's plan nowhere explains how its decisions could be more effectively enforced.

FRANKLIN'S PROPOSED UNION

[The text is as given in *Documents relating to the Colonial History of New York*, vol. vi, pp. 889-91.]

PLAN OF A PROPOSED UNION OF THE SEVERAL COLONIES OF MASSACHUSETS BAY, NEW HAMPSHIRE, CONNECTICUT, RHODE ISLAND, NEW YORK, NEW JERSEYS, PENNSYLVANIA, MARYLAND, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA, FOR THEIR MUTUAL DEFENCE AND SECURITY, AND FOR EXTENDING THE BRITISH SETTLEMENTS IN NORTH AMERICA.

[Only the four New England Colonies, New York, and Pennsylvania were represented at the Albany Congress.]

That humble application be made for an Act of the Parliament of Great Brittain,[1] by virtue of which one General Government may be formed in America, including the said Colonies, wi[illegible] and under which Governments each Colony may [illegible]tain each present Constitution, except in the particulars wherein a change[2] may be directed by the said Act, as hereafter follows.

That the said General Government be administered by a President-General, to be appointed and supported by the Crown,[3] and a Grand Council,[4] to be chosen by the

[1] By recognizing the necessity of an Act of Parliament, Franklin acknowledged the sovereignty of the British Parliament over the several Assemblies; a sovereignty which was at a later date questioned by him as well as by other writers.

[2] 'charge' in text.

[3] There had been constant friction and dispute in New York and Massachusetts over the question of securing to the Governor a permanent salary, and the Board of Trade had on more than one occasion proposed that the salaries should be paid by the Crown. Hence the wisdom of Franklin's proposal. See *Documents relating to the Colonial History of New York*, vol. v, p. 285; Egerton, *Short History of British Colonial Policy*, p. 132; and Greene, *The Provincial Governor*, Harv. Historical Studies, vii, pp. 167-76.

[4] The Grand Council, according to Franklin, was intended to represent all the several Houses of Representatives of the Colonies as a House of Representatives did the several towns or counties of a Colony. Could all the people of a Colony be consulted and unite in public measures a House of Representatives would be needless; and could all the Assemblies

representatives of the people of the several Colonies, met[1] in their respective Assemblies.

That within months after the passing of such Act the House of Representatives in the several Assemblies that happen to be sitting within that time or that shall be specially for that purpose convened may and shall chose Members for the Grand Council[2] in the following proportions; that is to say:—

Massachusets Bay	7
New Hampshire	2
Connecticut	5
Rhode Island	2
New York	4
New Jerseys	3
Pennsylvania	6
Maryland	4
Virginia	7
North Carolina	4
South Carolina	4
	48

who shall meet for the present time at the City of Philadelphia in Pennsylvania,[3] being called by the President General as soon as conveniently may be after his appointment.

That there shall be a new election of Members for the

conveniently consult and unite in general measures, the Grand Council would be unnecessary. Franklin therefore stoutly opposed the proposal of the members of the Council of New York to give the Governors and Councils of the several Provinces a share in the choice of the Grand Council as opposed to the theory and practice of the British Constitution.

[1] 'meet' in text.

[2] With regard to provincial representation in Grand Council, see remarks in Introduction.

[3] 'Philadelphia was named as being nearer the centre of the Colonies, where the Commissioners could be well and cheaply accommodated.' One realizes the physical difficulties in the way of a Federal Assembly when one finds Franklin justifying the choice on the ground that the most distant members those from New Hampshire and South Carolina need not take more than fifteen or twenty days over the journey thither.

Grand Council every three years,[1] and, on the death or resignation of any Member, his place shall be supplyed by a new choice at the next sitting of the Assembly of the Colony he represented.

That after the first three years, when the proportion of money arising out of each Colony to the General Treasury can be known, the number of Members to be chosen for each Colony shall from time to time in all ensuing elections be regulated by that proportion (yet so as that the number to be chosen by any one Province be not more than seven or less than two).

That the Grand Council shall meet once in every year,[2] and oftener if occasion require, at such time and place[3] as they shall adjourn to at the last preceding meeting, or as they shall be called to meet at by the President General, on any emergency, he having first obtained in writing the consent of seven of the Members to such call, and sent due and timely notice to the whole.

That the Grand Council have power to chuse their Speaker,[4] and shall neither be dissolved, prorogued, nor continue sitting longer than six weeks at one time, without their own consent[5] or the special command of the Crown.

[1] Triennial Acts were passed by several of the Colonial Assemblies, but were resented by the Home Government as an invasion of the Governor's prerogative to summon, prorogue, and dissolve the Assemblies as he thought fit. (See Greene, *op. cit.*, pp. 155-8.)

[2] Annual Sessions of the Assembly were necessary under the Pennsylvania and Massachusetts Charters. In most Colonies they were necessary to obtain supplies; but in Virginia, where official salaries were paid out of a permanent fund, periods of three or four years passed without the Assembly meeting.

[3] The claim of the Governor to adjourn the Assembly to any place he might think fit had been a Colonial grievance. Thus in 1728 Governor Burnet adjourned the House of Assembly to Salem. (Hutchinson's *History of the Province of Massachusetts Bay*, vol. ii, p. 351.

[4] As a general rule the Governor's approval to the Assembly's choice of a Speaker was a mere formality; but in a few cases the Governor claimed to exercise a right of veto, and such right was expressly maintained in the amended Charter of Massachusetts of 1725. (Hutchinson, *op. cit.*, p. 319.

[5] On this see Greene, *op. cit.*, pp. 151-7.

That the Members of the Grand Council shall be allowed for their services 10 shillings sterling per diem,[1] during their sessions or journey to and from the place of meeting; 20 miles to be reckoned a days journey.

That the assent of the President General be requisite to all Acts of the Grand Council, and that it be his office and duty to cause them to be carried into execution.

That the President General, with the advice of the Grand Council, hold or direct all Indian treaties in which the general interest or welfare of the Colonys may be concerned; and make peace or declare war with the Indian Nations.[2] That they make such laws as they judge necessary for the regulating all Indian trade. That they make all purchases from Indians for the Crown of lands [now] not within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions.[3] That they make new settlements[4] on such purchases by granting lands [in the King's name] reserving a quit rent to

[1] The general practice was for the counties and towns to pay their representatives, according to the system formerly in force in England.

[2] The regulation of Indian affairs was one of the chief reasons for some kind of union. The appointment of Sir William Johnson in 1754 as Imperial Representative in Indian Affairs partly met the mischief. The Proclamation of October, 1763, was, for the most part, due to the urgency of the Indian question. On Indian relations see *New York Colonial Documents*, iv–vi, *passim*.

[3] Franklin explained: 'It is supposed better that there should be one purchaser than many; and that the Crown should be that purchaser or the Union in the name of the Crown. By this means the bargains may be more easily made, the price not enhanced by numerous bidders, future disputes about private Indian purchases and monopolies of vast tracts to particular persons (which are prejudicial to the settlement and prosperity of the country) prevented; and the land, being again granted in small tracts to the settlers, the quit-rents reserved may in time become a fund for support of Government, for defence of the country, ease of taxes, &c.

[4] 'Strong forts on the Lakes, the Ohio, &c., may at the same time they secure our present frontiers, serve to defend new Colonies settled under their protection; and such Colonies would also mutually defend and support such forts and better secure the friendship of the Indians. . . .

A particular Colony has scarce strength enough to extend itself by

the Crown for the use of the General Treasury. That they make laws for regulating and governing such new settlements, till the Crown shall think fit to form them into particular Governments.[1]

That they raise and pay soldiers, and build forts for the defence of any of the Colonies, and equip vessels of force to guard the coasts and protect the trade on the ocean, lakes, or great rivers; but they shall not impress men in any Colonies, without the consent of its Legislature. That for these purposes they have power to make laws[2] and lay and levy such general duties, imposts or taxes as to them shall appear most equal and just, considering the ability and other circumstances of the inhabitants in the several Colonies, and such as may be collected with the least inconvenience to the people, rather discouraging luxury, than loading industry with unnecessary burthens. That they might appoint a General Treasurer, and a particular Treasurer in each Government when necessary, and from time to time may order the sums in the Treasuries of each Government into the General Treasury, or draw on them for special payments as they find most convenient yet no money to issue but by joint orders of the President-General and Grand Council, except where sums have been appropriated to particular purposes, and the President-

new settlements, at so great a distance from the old; but the joint power of the Union might suddenly establish a new Colony or two in those parts, or extend an old Colony to particular passes, greatly to the security of our present frontiers, increase of trade and people, breaking through the French communication between Canada and Louisiana, and speedy settlement of the intermediate land.'

There can be no question as to the wisdom of the above suggestions.

[1] Franklin here anticipates the practice of the Federal Constitution in the case of the Territories.

[2] These laws would be such only as might be necessary for the government of the Settlements; the raising, regulating, and paying soldiers for the general services, the regulating of Indian trade, and laying and collecting the general duties and taxes. It was not intended that there should be any interference with the Constitution or the Government of the particular Colonies, which were to be left to their own laws and to lay, levy, and apply their own taxes as before.

General is previously impowered by an Act to draw for such sums.

That the General Accounts shall be yearly settled and reported to the several Assemblies.

That a quorum of the Grand Council, impowered to act with the President-General, do consist of twenty-five Members, among whom there shall be one or more from a majority of the Colonies. That the laws made by them for the purposes aforesaid shall not be repugnant, but as near as may be agreable, to the laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing; and if not disapproved within three years after presentation, to remain in force.

That in case of the death of the President General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the same powers and authority, to continue until the King's pleasure be known.

That all Military Commission Officers, whether for land or sea service, to act under this general Constitution, shall be nominated by the President General;[1] but the approbation of the Grand Council is to be obtained before they receive their Commissions; and all Civil Officers are to be nominated by the Grand Council,[1] and to receive the President General's approbation before they officiate; but in case of vacancy by death or removal of any Officer, Civil or Military, under this Constitution, the Governor of the Province in which such vacancy happens may appoint till the pleasure of the President General and Grand Council can be known. That the particular Military as well as Civil establishments in each Colony remain in their present state, this General Constitution notwithstanding.

[1] There was constant friction between the Governors and the Colonial Assemblies over the question of appointments. The Assemblies claimed the right to appoint all officers who were charged with the collection, custody, and disbursement of the public funds; but in time, at least in Massachusetts, they succeeded in interfering with the appointment and removal of military officers. (See Greene, *op. cit.*, pp. 181-92.)

And that on sudden emergencies any Colony may defend itself, and lay the aeeount of expenee thenee arisen before the President General and Grand Council, who may allow and order payment of the same as far as they judge such aeeounts just and reasonable.

After debate on the foregoing plan:—

Resolved: That the Commissioners from the several Governments be desired to lay the same before their respective Constituents for their eonsideration, and that the Seeretary to this Board transmit a copy thereof with their vote thereon to the Governor of each of the Colonies whieh have not sent their Commissioners to this Congress.

THE BRITISH NORTH AMERICA ACT, 1867

30 AND 31 VICTORIA, CAP. III

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for purposes connected therewith.

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom:[1]

And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire:

And whereas on the establishment of the Union by authority of Parliament, it is expedient not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared:

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America:

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this

[1] This refers to the system of parliamentary cabinet government as opposed to the system of presidential government in the United States. The criticism therefore of Professor Dicey (*Introduction to the Study of the Law of the Constitution*, 6th ed., p. 162) seems hardly deserved. The 3rd Resolution of the Quebec Conference ran as follows: 'In framing a constitution for the general government, the Conference, with a view to the perpetuating of our connexion with the mother country and to the promotion of the best interests of the people of these provinces, desires to follow the model of the British Constitution, so far as our circumstances will permit.'

present Parliament assembled, and by the authority of the same as follows:

I. Preliminary.

Short Title.

1. This Act may be cited as *The British North America Act*, 1867.[1]

Provisions referring to the Queen.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II. Union.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion under that name accordingly.[2]

Construction of subsequent provisions of Act.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

Four Provinces.

5. Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

[1] The British North America Act has been amended by 34 & 35 Vict. ch. 28, An Act respecting the Establishment of Provinces in the Dominion of Canada, 1871; by 38 & 39 Vict. ch. 38, An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section 18 of the British North America Act 1867, 1875; by 49 & 50 Vict. ch. 35, An Act respecting the representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province, and by 7 Edward VII ch. 11, which rearranged the annual subsidies to be paid to the Provincial Government.

[2] The new Constitution came into force on July 1, 1867.

Provinces of Ontario and Quebec;

6. The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form two separate Provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Nova Scotia and New Brunswick.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act.

Decennial Census.

8. In the general census of the population of Canada, which is hereby required to be taken in the year One thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished.

III. Executive Power.

Executive Power in the Queen.

9. The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

Provisions referring to Governor-General.

10. The provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being carrying on the Government of Canada, on behalf and in the name of the Queen, by whatever title he is designated.

Constitution of Privy Council for Canada.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be Members of that Council shall be, from time to time, chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be, from time to time, removed by the Governor-General.[1]

[1] It should be noted that the provisions of the Act imply, though they do not express, the unwritten conventions of British parliamentary prac-

All powers under Acts to be exercised by Governor-General with advice of Privy Council or alone.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General with the advice, or with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada or any Members thereof, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

tice. It was reserved for the Australian Commonwealth Act expressly to state that a Minister must become a member of the legislature within a prescribed time. The number of the Privy Council has been altered from time to time as new departments have required representation. At present the Privy Council consists of

Premier and President of Council.	Minister of Agriculture.
Minister of Trade and Commerce.	,, ,, Public Works.
Secretary of State who is also the head of new Department of external affairs).	,, ,, Finance.
	,, ,, Railways and Canals.
Minister of Justice.	,, ,, Interior.
,, ,, Marine and Fisheries.	,, ,, Customs.
,, ,, Militia and Defence.	,, ,, Inland Revenue.
Postmaster General.	,, ,, Labour.

It should be noted, and the point is of importance in maintaining the federal principle, that the federal character of the Government is always expressed in the Constitution of the Privy Council. There are generally additional Ministers without portfolios.

Provisions referring to Governor-General in Council.

13. The provisions of this Act referring to the Governor-General-in-Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada.[1]

Power to Her Majesty to authorize Governor-General to appoint deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from time to time to appoint any person or any persons jointly or severally to be his deputy or deputies within any part or parts of Canada, and in that capacity to exercise, during the pleasure of the Governor-General such of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen: but the appointment of such a deputy or deputies shall not affect the exercise by the Governor-General himself of any power, authority or function.

Command of armed Forces.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces of and in Canada, is hereby declared to continue and be vested in the Queen.[2]

[1] The position of the Governor-General has been somewhat altered by the amended instructions given to Lord Lorne in 1878. Before this time certain classes of Bills had to be reserved by him for imperial consideration; this practice has been discontinued, but a suspending clause is now inserted in Acts which otherwise would require reservation. Some doubt having arisen as to the position of the Governor-General in the exercise of the pardoning power, after the visit to England of Mr. Blake, the Canadian Minister for Justice visited England to confer with the Imperial Government. In accordance with the arrangement arrived at, the instructions of 1878 prescribe that the Governor-General shall not pardon an offender without first receiving in capital cases the advice of the Privy Council, and in other cases the advice of one at least of his Ministers. In any case in which a pardon or reprieve might directly affect the interests of the Empire or of any country or place beyond the jurisdiction of the Government of the Dominion, the Governor-General, before deciding, must take those interests specially into his own personal consideration in conjunction with such advice of his Ministers. See *Can. Sess. Papers*, 1879, No. 181. The position of the Governor-General with respect to Provincial Governors is dealt with in the note to Sec. 59.

[2] For many years after Confederation the officer commanding the Canadian Militia was an officer of the Imperial army lent to Canada. In 1904 there was trouble between Lord Dundonald and the Dominion Government, and the office of Commander-in-Chief was technically abolished. Lord Dundonald's successor in the command of Canadian Militia was a British officer; but the present holder of the post is a Canadian.

Seat of Government.

16. Until the Queen otherwise directs the Seat of Government of Canada shall be Ottawa.[1]

IV. Legislative Power.

Constitution of Parliament of Canada.

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate,[2] and the House of Commons.

Privileges, &c. of Houses.

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.[3]

First session of the Parliament.

19. The Parliament of Canada shall be called together not later than six months after the Union.[4]

[1] There had been considerable controversy in the Canadian Assembly over the choice in 1858 of Ottawa as the capital; the question having been left to the arbitration of Queen Victoria. It should be noted that the Dominion, unlike the United States and the Commonwealth of Australia, did not establish the seat of government in a district made federal property. Although Ottawa is the seat of the Dominion Government it remains a portion of Ontario and as such inferior to the provincial capital, Toronto.

[2] In the Quebec Resolutions and the first draft of the Bill as given in Pope's *Confederation Documents*, the Upper House was called the Legislative Council.

[3] This section was repealed by 38 & 39 Vict. ch. 38, and the following provisions were substituted:—

'The privileges . . . Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom . . . and by the members thereof.'

A difficulty arose at the time of the Pacific Railway scandal from the inability of Parliamentary Committees to take evidence on oath; the British House of Commons not having possessed this right, except in the case of private Bills, until 1871. Under the present law the Canadian Parliament can assimilate its practice to that prevailing at the time in the British Parliament.

[4] The first Parliament met on November 7, 1867.

20. There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session. Yearly session of the Parliament of Canada.

THE SENATE.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two[1] Members, who shall be styled Senators. Number of Senators.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions:— Representation of Provinces in Senate.

(1) Ontario;

(2) Quebec:

(3) The Maritime Provinces: Nova Scotia and New Brunswick; which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows:—Ontario by Twenty-four Senators, Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the case of Quebec, each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four Electoral Divisions of Lower Canada specified in Schedule A to Chapter I of the Consolidated Statutes of Canada.[2]

23. The qualifications[3] of a Senator shall be as follows:— Qualifications of Senators.

(1) He shall be of the full age of thirty years:

[1] Under the British North America Act of 1871, 34 & 35 Vict. ch. 28, doubts were set at rest as to the power of the Dominion Parliament to establish Provinces out of Territories and to provide for their representation in such Parliament. There are at present 87 members of the Senate: 24 from Ontario, 24 from Quebec, 10 from Nova Scotia, 10 from New Brunswick, 4 from Prince Edward Island, 3 from British Columbia, 4 from Manitoba, 4 from Alberta, 4 from Saskatchewan.

[2] Note subsequent failure to express the federal principle in the allotment of new senators to the Western Provinces.

[3] Contrast democratic provisions of Commonwealth Statute.

(2) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick before the Union, or of the Parliament of Canada after the Union:

(3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture,[1] within the Province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same:

(4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities:

(5) He shall be resident in the Province for which he is appointed:

(6) In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that division.

Summons of senator.

24. The Governor-General shall from time to time, in the Queen's name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate:[2] and, subject to the provisions of this Act, every person so

[1] A grant of land *en franc aleu roturier* was roughly analogous to a grant in free and common socage. Such land was subject to no dues or payments. See *The Seigniorial System in Canada*, by W. B. Munro, 1907, p. 53.

[2] See Pope's *Confid. Documents*, pp. 61-65. At the Quebec Conference G. Brown strongly objected leaving to the Executive the choice of Legislative Councillors (senators).

summoned shall become and be a member of the Senate and a Senator.

Summons of First body of Senators.

25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Addition of Senators in certain cases.

26. If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six Members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.[1]

Reduction of Senate to normal number.

27. In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more.

Number of Senators.

28. The number of Senators shall not at any time exceed seventy-eight.[2]

Tenure of place.

29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Resignation of place in Senate.

30. A Senator may by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

[1] This provision was added at the suggestion of the Home Government to meet the case of a possible deadlock between the two Houses of Parliament. In December, 1873, the Canadian Privy Council advised that an application should be made to the Crown to add six members to the Senate. The recommendation was forwarded to the Secretary for the Colonies by the Governor-General. The request was refused on the ground that 'Her Majesty could not be advised to take the responsibility of interfering with the constitution of the Senate except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without her intervention, and when it could be shown that the limited creation of senators allowed by the Act would apply an adequate remedy'. *Can. Sess. Papers*, 1877, No. 68

[2] This section has been in fact repealed by the results of the subsequent law.

Disqualification of Senators.

31. The place of a Senator shall become vacant in any of the following cases:—

(1) If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate;

(2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a Foreign Power:

(3) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter:

(4) If he is attainted of treason or convicted of felony or of any infamous crime:

(5) If he ceases to be qualified in respect of property or residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the Seat of the Government of Canada, while holding an office under that Government requiring his presence there.

Summons on vacancy in Senate.

32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall by summons to a fit and qualified person fill the vacancy.

As to qualifications, &c.

33. If any question arises respecting the qualification of a Senator or a vacancy in the Senate, the same shall be heard and determined by the Senate.

Appointment of Speaker.

34. The Governor-General may from time to time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

Quorum of Senate.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

36. Questions arising in the Senate shall be decided by

a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

The House of Commons.

Constitution of House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one Members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.[1]

Summoning of House of Commons.

38. The Governor-General shall from time to time, in the Queen's name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral Districts of the Four Provinces.

40. Until the Parliament of Canada otherwise provides,[2] Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1. ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return one Member.[3]

[1] Under the Representation Acts of 1903 and 1904 Ontario consists of 85 districts returning 86 members, Ottawa having two members. (It is unnecessary therefore to reprint the Schedule of the Act containing the Districts of Ontario at the time of its passing.) Quebec consists of 65 districts; Nova Scotia of 17, Halifax having two members; New Brunswick of 12, St. John's city and county having two members; Prince Edward Island of 3, Queen's district having two members; Manitoba of 10; Saskatchewan and Alberta of 10 and 7 (under their Representation Act of 1907); and British Columbia of 7 districts. These figures will of course be changed after the decennial redistribution of 1911.

[2] At the Quebec Conference several of the Prince Edward Island representatives disapproved of the principle of representation by population; but they stood alone in this attitude. Pope, *op. cit.*, pp. 68-73.

[3] See note 1.

2. QUEBEC.

Quebec shall be divided into sixty-five Electoral Districts, composed of the sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter two of the Consolidated Statutes of Canada, Chapter seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the twenty-third year of the Queen, Chapter one, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the purposes of this Act an Electoral District entitled to return one Member.

3. NOVA SCOTIA.

Each of the eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return two members, and each of the other Counties one Member.

4. NEW BRUNSWICK.

Each of the fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those fifteen Electoral Districts shall be entitled to return one Member.[1]

Continuance of existing election laws until Parliament of Canada otherwise provides.

41. Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union, relative to the following matters or any of them, namely: the qualifications and disqualifications of persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members; the oaths to be taken by Voters; the Returning Officers, their powers and duties, the proceedings at Elections, the periods during which Elections may be continued, the trial of controverted Elections and proceedings incident thereto, the vacating of seats of Members, and the execution of new Writs in cases

[1] On these subsections see preceding note.

of seats vacated otherwise than by dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.[1] Provided that until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British Subject, aged Twenty-one years or upwards, being a householder, shall have a vote.

Writs for first Election.

42. For the first Election of Members to serve in the House of Commons, the Governor-General shall cause Writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit.

The person issuing Writs under this Section shall have the like powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Provinces of Canada, Nova Scotia, or New Brunswick: and the Returning Officers to whom Writs are directed under this Section shall have the like powers as are possessed at the Union by the Officers charged with the Returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

[1] For many years the Dominion Parliament refrained from establishing a uniform franchise for the Dominion; and the list of voters used in the election of representatives to the Provincial Legislative Assemblies was used at the election of members for the House of Commons. In 1885, however, a Dominion Franchise Bill was passed through Parliament in the face of fierce opposition. The Act was bitterly complained of on the ground of its partisan character, and was repealed in 1898, when the former system was restored.

With regard to controverted elections the Canadian practice has closely followed British precedent. At the time of confederation, and for several years after, controverted elections were dealt with by a 'General Committee of Elections', consisting of six members appointed by the Speaker. By Acts passed in 1873 and 1874 the trial of election petitions was transferred to the judges in the several Provinces. An appeal now lies to the Supreme Court. The law with regard to corrupt practices at elections closely resembles the law in force in Great Britain

As to casual vacancies.

43. In case a vacancy in the representation in the House of Commons of any Electoral District happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to election of Speaker.

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable speed to elect one of its members to be Speaker.

As to filling up vacancy in office of Speaker.

45. In case of a vacancy happening in the office of Speaker by death, resignation, or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be Speaker.

Speaker to preside.

46. The Speaker shall preside at all meetings of the House of Commons.

Provision in case of absence of Speaker.

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the Member so elected shall, during the continuance of such absence of the Speaker, have and execute all the powers, privileges, and duties of Speaker.[1]

Quorum of House of Commons.

48. The presence of at least twenty Members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote.

Its duration.

50. Every House of Commons shall continue for five

[1] In 1885 the English practice was adopted of appointing the Chairman of Committees to act as Deputy-Speaker when necessary.

years[1] from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General) and no longer.

Decennial readjustment of representation.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be readjusted by such authority in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

(1) Quebec shall have the fixed number of sixty-five members:

(2) There shall be assigned to each of the other Provinces such a number of Members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained):

(3) In the computation of the number of Members for a Province, a fractional part not exceeding one-half of the whole number requisite for entitling the Province to a Member shall be disregarded: but a fractional part exceeding one-half of that number shall be equivalent to the whole number:

(4) On any such readjustment the number of Members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada[2] at the then last preceding readjustment of the number of Members for the Province is ascer-

[1] The term of five years was chosen after the example of New Zealand. John A. Macdonald would have preferred to follow the British precedent.

[2] These words mean the whole population of Canada, including that of Provinces which have been admitted to the Confederation since the passing of the British North America Act. The number of six members given to Prince Edward Island is not a fixed minimum; but is liable to readjustment either way under the provisions of the subsection. See *Attorney-General for New Brunswick, and Attorney-General for Prince Edward Island* v. *Attorney-General for Dominion of Canada* [1905] A. C. 37.

tained at the then latest census, to be diminished by one-twentieth part or upwards:

(5) Such readjustment shall not take effect until the termination of the then existing Parliament.[1]

Increase of number of House of Commons.

52. The number of Members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes: Royal Assent.

Appropriation and Tax Bills.

53. Bills for appropriating any part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of money votes.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost, to any purpose, that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed.[2]

Royal assent to Bills, &c.

55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but

[1] According to Macdonald, it was decided 'to accept the representation of Lower Canada as a fixed standard—as a pivot on which the whole would turn—since that Province was the best suited for the purpose, on account of the comparatively permanent character of its population and from its having neither the largest nor the least number of inhabitants'. (*Confederation Debates*, p. 38.)

Under the last census the total number of members is 221, of whom Quebec returns 65, Ontario 86, Nova Scotia 18, New Brunswick 13, Prince Edward Island 4, Manitoba 10, Saskatchewan 10, Alberta 7, British Columbia 7, and Yukon Territory 1.

[2] This section in substance re-enacts a provision of the Union Act of 1840. Before that time the proposals by private members to make grants of public money had become a scandal and nuisance. The remedy was to secure the previous recommendation of the Crown.

The procedure of the Dominion House of Commons on Money bills is substantially the same as that of the British House of Commons. The subject is treated in detail in chapter xvii. of Bourinot's *Parliamentary Procedure and Practice in the Dominion of Canada*, pp. 530–81.

subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the Bill for the signification of the Queen's pleasure.[1]

Disallowance by Order-in-Council of Act assented to by Governor-General.

56. Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification.

Signification of Queen's pleasure

57. A Bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within

[1] Before 1878 the Governor-General was forbidden by his instructions to assent to any Bill

(1. regarding divorce;
(2. conferring a grant upon himself;
(3. making paper money legal tender;
(4. imposing differential duties;
(5. containing provisions inconsistent with treaty obligations:
(6. interfering with the discipline or control of the Crown's forces;
(7. interfering with the royal prerogative, or with the rights and property of British subjects outside the Dominion, or prejudicing British trade and shipping;
(8. containing provisions to which assent has already been refused at home;

except in very exceptional circumstances, unless such Bill contained a clause suspending its operation till the pleasure of the Crown could be known.

Under these instructions no less than twenty-one Bills were reserved by the Governor-General between 1867 and 1877; but in the latter year the practice was altered, as explained in note on p. 125. Mr. Blake, the Canadian Minister of Justice, having strongly maintained that it would be 'more conformable to the spirit of the Constitution of Canada, as actually framed, that the legislation should be completed on the advice and responsibility of Her Majesty's Privy Council for Canada; and that as a protection to Imperial interests, the reserved right of disallowance of such completed legislation is sufficient for all purposes'. *Can. Sess. Papers*, 1877, No. 13.

on Bill reserved.

two years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V. Provincial Constitutions.

Executive Power.

Appointment of Lieutenant-Governors.

58. For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

Tenure of office of Lieutenant-Governor.

59. A Lieutenant-Governor shall hold office during the pleasure of the Governor-General;[1] but any Lieutenant-Governor appointed after the commencement of the first Session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by Message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then, within one week after the commencement of the next Session of the Parliament.

[1] The case of Mr. Letellier de St. Just, who was dismissed in 1879 by the Dominion Government from the Lieutenant-Governorship of Quebec, shows that the discretion of the Canadian Ministry is practically absolute and that the Governor-General cannot act without the advice of his responsible Ministers. No importance can be attached to the omission of the words 'in Council' after Governor-General in Section 59. (*Can. Sess. Papers*, 1880, No. 18. See also Todd's *Parliamentary Government in British Colonies*, 2nd ed., pp. 601–622.) In 1900 Mr. McInnes, the Lieutenant Governor of British Columbia, was also dismissed by the Governor-General in Council; but the justice of such dismissal seems to have been generally admitted. (See Willison's *Sir W. Laurier and the Liberal Party*, vol. i, p. 359.)

Salaries of Lieutenant-Governors.

60. The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c., of Lieutenant-Governor.

61. Every Lieutenant-Governor shall, before assuming the duties of his office, make and subscribe before the Governor-General or some person authorized by him, Oaths of Allegiance and Office similar to those taken by the Governor-General.

Application of provisions referring to Lieutenant-Governor.

62. The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the Chief Executive Officer or Administrator for the time being carrying on the Government of the Province, by whatever title he is designated.

Appointment of Executive Officers for Ontario and Quebec.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following Officers, namely: the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works,[1] with, in Quebec, the Speaker of the Legislative Council and the Solicitor-General.[1]

Government of Nova Scotia and New Brunswick.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act.

Powers to be exercised by Lieutenant-Governor

65. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower

[1] In Ontario, Agriculture and Public Works have now separate Ministers, and there is a Minister for Education. There is also a Premier and President of the Council. In Quebec, the offices at present are: Prime Minister and Attorney-General; Lands and Forests; Provincial Treasurer; Agriculture; Provincial Secretary; Public Works and Labour; Colonization; Mines and Fisheries.

of Ontario or Quebec with advice or alone.

Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils or any Members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec.[1]

As to Lieutenant-Governor in Council.

66. The provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

As to absence, &c., of Lieutenant-Governor.

67. The Governor-General in Council may from time to time appoint an Administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability.

Seats of

68. Unless and until the Executive Government of any

[1] The general effect of these sections, together with the provisions of Section 92, is, in the words of Lord Watson, neither to weld the Provinces into one nor to subordinate Provincial Governments to a central authority, but to create a Federal Government . . . each Province retaining its independence and autonomy. . . . The Act places the Constitutions of all Provinces within the Division on the same level; and what is true with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick. (*Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892] App. Cas. 437.)

Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.[1] Provincial Governments.

Legislative Power.

1. Ontario.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario. Legislature for Ontario.

70. The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.[2] Electoral Districts.

2. Quebec.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec. Legislature for Quebec.

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant-Governor in the Queen's name by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act. Constitution of Legislative Council.

73. The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec. Qualification of Legislative Councillors.

[1] Of the other Provinces, the capital of Manitoba is Winnipeg; of Saskatchewan, Regina; of Alberta, Edmonton; of British Columbia, Victoria; and of Prince Edward Island, Charlottetown.

[2] The representation has been altered from time to time.

Resignation, &c.

74. The place of a Legislative Councillor of Quebec shall become vacant in the cases, *mutat mutandis*, in which the place of Senator becomes vacant.

Vacancies.

75. When a vacancy happens in the Legislative Council of Quebec by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

Questions as to vacancies, &c.

76. If any question arises respecting the qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council.

77. The Lieutenant-Governor may, from time to time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec, to be Speaker thereof, and may remove him and appoint another in his stead.

Quorum of Legislative Council.

78. Until the Legislature of Quebec otherwise provides, the presence of at least ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers.

Voting in Legislative Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal, the decision shall be deemed to be in the negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members,[1] to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for assent any Bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the second and third readings of such Bill have been passed in the Legislative Assembly

[1] The number has since been increased.

with the concurrence of the majority of the Members representing all those Electoral Divisions or Districts, and the assent shall not be given to such Bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor, stating that it has been so passed.

3. Ontario and Quebec.

First Session of Legislatures.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union.

Summoning of Legislative Assemblies.

82. The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of holders of office.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say:—the Offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.

Continuance of existing

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide,[1] all laws which at the

[1] Laws on these subjects have since been passed by the Legislatures of Ontario and of Quebec.

election laws.

Union are in force in those Provinces respectively, relative to the following matters or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as Members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at Elections, the periods during which such Elections may be continued, and the trial of controverted Elections and the proceedings incident thereto, the vacating of the seats of Members, and the issuing and execution of new Writs in case of seats vacated otherwise than by dissolution, shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British Subject aged Twenty-one years or upwards, being a householder, shall have a vote.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer.

Yearly Session of Legislature.

86. There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one Session and its first sitting in the next Session.

Speaker, quorum, &c.

87. The following provisions of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the Election of a Speaker

originally and on vacancies, the duties of the Speaker, the absence of the Speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4. Nova Scotia and New Brunswick.

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act;[1] and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

5. Ontario, Quebec, and Nova Scotia.

First Elections.

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia, shall cause Writs to be issued for the first Election of Members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor-General directs, and so that the first Election of Member of Assembly for any Electoral District or any subdivision thereof shall be held at the same time and at the same places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

6. The Four Provinces.

Application to Legislatures of provisions respecting

90. The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to appropriation and tax Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts,[2] and

[1] Attempts have from time to time been made to do away with the Nova Scotian Legislative Council; and on one occasion such a measure was nearly passing into law, but at the last moment the newly appointed members of the Legislati[illegible] Council refused to pronounce their own doom. The New Brunswick Legislative Council has been abolished.

[2] The effect of this section, together with Section 56, is to place the Governor-General in Council in the place of the Crown for the disallow-

money votes, &c.

the signification of pleasure on Bills reserved,[1]—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made

ance of Provincial Acts. Sir John Macdonald laid down in a Memorandum in 1868 the general course that should be pursued with regard to this subject by the Dominion Government. 'In deciding whether any Acts of a Provincial Legislature should be disallowed or sanctioned, the Government must not only consider whether it affects the interests of the whole Dominion or not; but also whether it be unconstitutional, whether it exceeds the jurisdiction conferred on Local Legislatures, and, in cases where the jurisdiction is concurrent, whether it clashes with the legislation of the General Parliament; as it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution. Only in cases where the law and general interests of the Dominion imperatively demand it, the undersigned recommends that the following course be pursued: That, on receipt by your Excellency of the Acts passed by any Province, they be referred to the Minister of Justice for report, and that he with all convenient speed do report as to these Acts, which he considers free from objection of any kind; and, if such report be opposed by your Excellency in Council, that such approval be forthwith communicated to the Provincial Government.

'That he make a separate report or separate reports on those Acts which he may consider:

'1. As being altogether illegal and unconstitutional.

'2. As illegal or unconstitutional in part.

'3. In cases of concurrent jurisdiction, as clashing with the legislation of the General Parliament.

'4. As affecting the interests of the Dominion generally: and that in such report or reports he gives his reasons for his opinions.

'That when a measure is considered only partially defective, or when objectionable, as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication shall be had with the Provincial Government with respect to such measure, and that in such case the Act should not be disallowed if the general interests permit such a course, until the Local Government has an opportunity of considering and discussing the objection taken, and the Local Legislature has also an opportunity of remedying the defects found to exist.' (*Can. Sess. Papers*, 1870, No. 35. See *The Correspondence and Reports of the Minister of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation*, by W. E. Hodgins, 1867–1903. Continued by F. H. Gisborne, 1904–6. Monro, *Constitution of Canada*, p. 260, points out that from 1867 to 1882, out of 6,000 Acts only 31 were disallowed; 11, however, were disallowed from 1883 to 1887.)

[1] The power of reserving Bills was only given with the view of protecting Imperial interests and the maintenance of Imperial policy. Accordingly, 'in any Province the Lieutenant-Governor shall only reserve a Bill in his capacity as an officer of the Dominion and under instructions from the Governor-General.' (Sir John Macdonald in *Can. Sess. Papers*, 1886.)

applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada.

VI. Distribution of Legislative Powers.

Powers of the Parliament.

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

1. The Public Debt and Property:
2. The regulation of Trade and Commerce:[1]
3. The raising of money by any mode or system of Taxation:[2]
4. The borrowing of money on the Public Credit:
5. Postal Service:
6. The Census and Statistics:
7. Militia, Military and Naval Service, and Defence:

[1] Compare language of American Constitution, Article 1, Sec. 8 (subsec. 3): 'The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes,' and that of the Commonwealth Constitution, Sec. 51 (subsec. 1), which gives power to Parliament to make 'laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce with other countries and among the States'.

[2] The Commonwealth Statute adds: 'but so as not to discriminate between States and parts of States'

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada:
9. Beacons, Buoys, Lighthouses, and Sable Island:
10. Navigation and Shipping:
11. Quarantine and the establishment and maintenance of Marine Hospitals:
12. Sea Coast and Inland Fisheries:
13. Ferries between a Province and any British or Foreign Country, or between two Provinces:
14. Currency and Coinage:
15. Banking,[1] Incorporation of Banks, and the issue of Paper Money:
16. Savings Banks:
17. Weights and Measures:
18. Bills of Exchange and Promissory Notes:
19. Interest:
20. Legal Tender:
21. Bankruptcy and Insolvency:
22. Patents of Invention and Discovery:
23. Copyrights:
24. Indians and Lands reserved for the Indians:[2]
25. Naturalization and Aliens:
26. Marriage and Divorce:
27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters:
28. The establishment, maintenance, and management of Penitentiaries:
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces:

[1] Compare language of the Commonwealth statute: 'Banking, other than State Banking.'

[2] This section only applies while the lands are held in Indian occupation. (*St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46.)

And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[1]

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive Provincial Legislation.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

1. The amendment[2] from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor:
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes:
3. The borrowing of money on the sole credit of the Province:
4. The establishment and tenure of Provincial Offices, and the appointment and payment of Provincial officers:
5. The management and sale of the Public Lands belonging to the Province,[3] and of the timber and wood thereon:
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Provinces, other than Marine Hospitals:
8. Municipal Institutions in the Province:

[1] On this section generally see note on Sections 91 and 92.

[2] Under this provision, Manitoba, New Brunswick, and Prince Edward Island have abolished their Legislative Councils.

[3] 'Public Lands' include mines and minerals (*Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295.) Compare Sec. 109.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences, in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes:
10. Local works and undertakings, other than such as are of the following classes:
   a. Lines of Steam or other Ships, Railways,[1] Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:
   b. Lines of Steam Ships between the Province and any British or Foreign Country:
   c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces:
11. The Incorporation of Companies with Provincial Objects:
12. The Solemnization of Marriage in the Province:
13. Property and civil rights in the Province:
14. The Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including procedure in civil matters in those Courts:
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this Section:
16. Generally all matters of a merely local or private nature in the Province.[2]

[1] Compare Sec. 51 (subsections xxxii–xxxiv) of Commonwealth Act.

[2] The respective functions of the Dominion Parliament and of the Provincial Legislatures under Secs. 91 and 92 have given rise to much controversy and litigation. The general intention is to give to the Dominion Parliament authority to make laws for the general good government of the

Education.

93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions: Legislation respecting Education.

(1) Nothing in any such law shall prejudicially affect

country in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures. Were it possible to isolate and treat on a wholly separate footing the sixteen classes of subjects assigned to the Provincial Legislatures the case would be simple enough; but in fact some of the classes of subjects so assigned unavoidably run into and are embraced by some of the classes of subjects expressly assigned to the Dominion Parliament. To meet this difficulty in case of such overlapping pre-eminence was given to the Dominion Parliament. Notwithstanding, however, this provision, the Act cannot intend that the powers exclusively assigned to the Provincial Legislatures should be in consequence absorbed in those given to the Dominion Parliament. With regard, then, to certain classes of subjects, generally described in Section 91, legislative power continues to reside with regard to certain matters, falling within their general description, in the Legislatures of the Provinces. The language of the two sections must be read together and that of one interpreted and if necessary modified by the other. Thus a Provincial Act to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature notwithstanding the general power of the Dominion Parliament for the regulation of trade and commerce. Conversely, a general Temperance Act was held good; on the ground that it related to the peace, order, and good government of Canada, or to trade and commerce, although, in a sense, it dealt with 'property and civil rights'. Laws, it was said, designed for the promotion of public order, safety, and morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. Few if any laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; it could not have been intended, when assuring to the Provinces exclusive legislative authority in the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it.

Confusion has perhaps been caused by the British North America Act refusing to recognize, except in the case of agriculture and immigration, concurrent powers in the Dominion Parliament and Provincial Legislatures; but inasmuch as subjects, which, in one aspect and for one purpose, fall within one section of the Act, may, in another aspect and for another purpose, fall within the other, the existence of concurrent authorities has not in fact been prevented. Thus while the Dominion Parliament deals with temperance legislation generally, a provincial statute may make regulations in the nature of police or municipal regulations of a merely local character, for the good government of taverns, &c., so long, of course, as they do not conflict with the general statute.

any right or privilege with respect to Denominational Schools which any class of persons have by law in the Province at the Union;[1]

(2) All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the

Whatever may have been the intentions of the framers of the law, the Provincial Legislatures possess as plenary and ample powers within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

Leading cases on the general interpretation to be placed on Sections 91 and 92 are *Citizens and Queen Insurance Companies* v. *Parsons*, Cartwright's *Cases under B. N. A. Act*, vol. i, 265; *Russell* v. *The Queen*, vol. i, 12; *Hodge* v. *The Queen*, vol. iii, 144; *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, reported in Wheeler's *Confederation Law of Canada*, pp. 1042–74.

A conference of representatives of the Dominion and the Provinces was held in March, 1910, with the object of arriving at an agreement as to the relative jurisdiction of Parliament and the Provincial Legislatures over commercial, financial, mining, and other companies. No agreement was arrived at, but there seems good ground for the opinion of the well-informed Toronto correspondent of the *Times* that 'owing to the exercise of equal powers by the federal and the provincial authorities much uncertainty and confusion now prevail in this important field of legislation'.

It would require a treatise to deal with the details of the subsections of these clauses as illustrated by the numerous cases. See the exhaustive notes in Wheeler, *op. cit.*, and the cases under them in Cartwright, *op. cit.*

[1] There must have been a right 'by law' and not merely by usage at the time of the Union. (See *Maher* v. *Town of Portland*, reported in Wheeler's *Confederation Law of Canada*, pp. 339–67.) Under the twenty-second section of the Manitoba Act, 1870, the provisions with regard to education were as follows:

'In and for the Province the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

'(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or practice in the Province at the Union.

'(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

'(3) In case any such provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provi-

separate Schools and School Trustees of the Queen's Roman Catholic Subjects, shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a system of separate or

sions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case and so far only as the circumstances of such case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.'

At the time of the entrance of Manitoba into the Union, there was no law or regulation or ordinance in force respecting education. There were in fact denominational schools existing; but the Public Schools Act of 1890 having introduced a general system of secular education the Privy Council held in *City of Winnipeg* v. *Barrett*, Wheeler, *op. cit.*, pp. 371-6, that the establishment of a national system of education upon an unsectarian basis might exist side by side with the right to set up and maintain denominational schools, and that the existence of the latter did not necessarily imply or involve immunity from taxation for the purposes of the former. That a system of denominational education had been established subsequent to the Union did not change the situation.

In the subsequent case of *Brophy* v. *Attorney-General of Manitoba*, Wheeler, *op. cit.*, pp. 376-88, it was held that the right of appeal under subsection 2, and the power reserved to the Dominion Parliament under subsection 3, were not bound by the provision of subsection 1, with regard to the state of things existing at the Union, but could be enforced generally when equitable grounds existed.

The effect of the Privy Council decision was thus to shift the burden of action upon the shoulders of the Dominion Government, which was placed in a very difficult position. They found themselves in conflict either with the Manitoba Government or with the Roman Catholic hierarchy. Still the methods adopted by Sir Mackenzie Bowell's administration were needlessly unconciliatory and aggressive. A remedial order was promptly served upon the Manitoba authorities, which was met by a refusal couched in moderate and conciliatory language. The attempt to force through the Dominion Parliament a remedial Bill in 1896 was one of the causes which led to the downfall of the Conservative Ministry. The measure was unpopular with many Protestant supporters of the Government, and, in the face of deliberate obstruction, Parliament came to an end by effluxion of time before its enactment as law. In the following year a compromise was arrived at between the new Liberal Government and the Manitoba Ministry. Under this, religious teaching can be given in the public schools under certain circumstances and under certain conditions by clergymen or Roman Catholic teachers.

There are excellent chapters on 'The School Question' and 'The School Settlement' in Willison's *Sir W. Laurier and the Liberal Party*, vol. ii, 201-77.

It is noteworthy that when in 1905 the new Provinces of Saskatchewan

Dissentient Schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal[1] shall lie to the Governor-General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this Section is not made, or in case any decision of the Governor-General in Council on any appeal under this Section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this Section, and of any decision of the Governor-General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for uniformity of laws in three Provinces.

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces, and from and after the passing of any Act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act

and Alberta were set on foot, the Dominion Government sought to secure for denominational schools a position similar to what they possess in Quebec and Ontario. The proposal was fiercely opposed; and finally a compromise was arrived at, under which power was given to bodies representing denominational schools to appoint teachers to give religious instruction at prescribed times.

[1] An amendment to this effect to No. 43 subsection (6) of the Quebec Resolution was moved by Mr. Galt at the Conference in London on December 4th, 1866, and carried. (See Pope's *Confederation Documents* 1895, p. 112.)

shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Agriculture and Immigration.

Concurrent powers of Legislation respecting Agriculture, &c.

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any law of the Legislature of a Province, relative to Agriculture or to Immigration, shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII. JUDICATURE.

Appointment of Judges.

96. The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, &c.;

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

In Quebec.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges of Superior Courts.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

Salaries, &c., of Judges.

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except

the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

General Court of Appeal, &c.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada,[1] and for the establishment of any additional Courts for the better Administration of the Laws of Canada.

VIII. Revenues; Debts; Assets; Taxation.

Creation of Consolidated Revenue Fund.

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

Expenses of collection, &c.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Interest of Provincial

104. The annual Interest of the public debts of the several Provinces of Canada, Nova Scotia, and New Bruns-

[1] In 1875 a Supreme Court was set on foot in Canada. It consists of a chief justice and five puisne judges, and has criminal and civil appellate jurisdiction throughout the Dominion. The judgement of the Court is final, 'saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative.' By these words the right of the Judicial Committee of the Privy Council to allow an appeal is preserved.

wick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada. public debts.

105. Unless altered by the Parliament of Canada,[1] the salary of the Governor-General shall be Ten Thousand Pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon. Salary of Governor General.

106. Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service. Appropriation from time to time.

107. All Stocks, Cash, Bankers' Balances, and Securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union. Transfer of Stocks, &c.

108. The Public Works and Property of each Province enumerated in the Third Schedule to this Act shall be the Property of Canada. Transfer of properties in Schedule

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.[2] Property in Lands, Mines, &c.

110. All Assets connected with such portion of the Asset connec-

[1] One of the first measures of the Canadian Parliament was a Bill reducing the salary to £6,500 per annum. But the assent of the Crown was withheld and the proposal not persisted in by Canada. It cost however, to the Dominion the services of Lord Mayo as Governor-General.

[2] This section gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, with the exception of such lands as the Dominion acquired rights to under Secs. 108 and 1[illegible] Lord Watson in *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767.)

with Provincial debts.

Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable to them.

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Assets of Ontario and Quebec.

113. The Assets enumerated in the Fourth Schedule to this Act, belonging at the Union to the Province of Canada, shall be the property of Ontario and Quebec conjointly.

Debt of Nova Scotia.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union Eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New Brunswick.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union Seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Payment of interest to Nova Scotia and New Brunswick.

116. In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the Government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Provincial public property.

117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for Fortifications or for the defence of the country.

Grants to Provinces.

118. The following sums shall be paid yearly by Canada

to the several Provinces for the support of their Governments and Legislatures:—

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick . . .	Fifty thousand.
	Two hundred and Sixty thousand;

and an annual grant in aid of each Province shall be made, equal to Eighty cents per head of the population as ascertained by the census of One thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two Provinces amounts to Four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act.[1]

[1] Nova Scotia was at first much aggrieved at the amount of financial aid received under the British North America Act. As the result of negotiations between Sir John Macdonald and Joseph Howe 'better terms' for that Province were sanctioned by the Canadian Parliament in their session of 1869. (See Pope's *Life of Sir John Macdonald*, vol. ii, pp. 32–7 and 301–11.)

Complaints having been afterwards made of the amount of the subsidies granted to the Provincial Governments, an agreement was arrived at by an Interprovince Conference in 1906, which was embodied in the British North America Act, 1907 (7 Edward VII, ch. 11). The new annual subsidies which replace those granted under Sec. 118 of the original Act are as follows:—

(1) A fixed grant according to population.

When population is under 150,000 . .	$100,000
150,000 but not exceeding 200,000 . .	$150,000
200,000 „ „ 400,000 . .	$180,000
400,000 „ „ 800,000 . .	$190,000
800,000 „ „ 1,500,000 . .	$220,000
Over 1,500,000	$240,000

(2) A grant at the rate of 80 cents per head of the population of the Pro-

Further grants to New Brunswick.

119. New Brunswick shall receive, by half-yearly payments in advance from Canada, for the period of ten years from the Union, an additional allowance of Sixty-three thousand dollars per annum; but as long as the public debt of that Province remains under Seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of Sixty-three thousand dollars.

Form of payments.

120. All Payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor-General in Council.

Canadian manufactures, &c.

121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Customs and Excise Laws

122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

Exportation and importation as between two Provinces.

123. Where Customs Duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares, and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on proof of payment of the Customs Duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs Duty as is leviable thereon in the Province of importation.

Lumber dues in New Brunswick.

124. Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues[1] provided in Chapter

vinces up to 2,500,000 and at the rate of 60 cents per head of so much of the population as exceeds that number.

(3) An additional grant of $100,000 given to the Province of British Columbia for a period of ten years.

[1] Under Article XXXI of the Treaty of Washington of 1871 these lumber dues were abolished; but New Brunswick received compensation from the Dominion for their abolition.

Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such dues: but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues.

Exemption of Public Lands.

125. No Lands or Property belonging to Canada or any Province shall be liable to taxation.

Provincial Consolidated Revenue Fund.

126. Such portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. Miscellaneous Provisions.

General.

As to Legislative Councillors of Province becoming Senators.

127. If any person being at the passing of this Act, a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand, addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate, shall thereby vacate his Seat in such Legislative Council.

Oath of Allegiance, &c.

128. Every Member of the Senate or House of Commons of Canada shall, before taking his Seat therein, take and subscribe before the Governor-General or some person authorized by him, and every Member of a Legislative

Council or Legislative Assembly of any Province shall, before taking his Seat therein, take and subscribe before the Lieutenant-Governor of the Province, or some person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor-General, or some person authorized by him, the Declaration of Qualification contained in the same Schedule.

Continuance of existing Laws, Courts, Officers, &c.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

Transfer of Officers to Canada.

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the Union had not been made.

Appointment of new Officers.

131. Until the Parliament of Canada otherwise provides, the Governor-General in Council may from time to time appoint such Officers as the Governor-General in Council

deems necessary or proper for the effectual execution of this Act.

Treaty obligations.

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Use of English and French languages.

133. Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses;[1] and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec.

Appointment of Executive Officers for Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint, under the Great Seal of the Province, the following Officers, to hold office during pleasure, that is to say,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor-General; and may, by order of the Lieutenant-Governor in Council, from time to time prescribe the duties of those Officers, and of the several Departments over which they shall preside

[1] Unless the practice of the Union Parliament had been continued the French-Canadians would never have agreed to Confederation.

or to which they shall belong, and of the Officers and Clerks thereof; and may also appoint other and additional Officers to hold office during pleasure, and may from time to time prescribe the duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

Powers, duties, &c., of Executive Officers.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada, as well as those of the Commissioner of Public Works.

Great Seals.

136. Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Construction of temporary Acts.

137. The words 'and from thence to the end of the then next ensuing Session of the Legislature', or words to the same effect used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject-matter of the Act is within the

powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the Act is within the powers of the same as defined by this Act.

As to errors in names.

138. From and after the Union the use of the words 'Upper Canada' instead of 'Ontario', or 'Lower Canada' instead of 'Quebec', in any Deed, Writ, Process, Pleading, Document, Matter, or Thing shall not invalidate the same.

As to issue of Proclamations before Union to commence after Union.

139. Any Proclamation under the Great Seal of the Province of Canada, issued before the Union, to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made.

As to issue of Proclamations after Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject-matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

Arbitration respecting Debts, &c.

142. The division and adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by

the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

Division of records.

143. The Governor-General in Council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the Officer having charge of the original thereof, shall be admitted as evidence.

Constitution of Townships in Quebec.

144. The Lieutenant-Governor of Quebec may from time to time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute Townships in those parts of the Province of Quebec in which Townships are not then already constituted, and fix the metes and bounds thereof.

X. Intercolonial Railway.

Duty of Government and Parliament of Canada to make railway herein described.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement, within Six months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without

intermission, and the completion thereof with all practicable speed.[1]

XI. Admission of other Colonies.

Power to admit Newfoundland, &c., into the Union.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.[2]

As to representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the admission of Newfoundland and Prince Edward Island or either of them, each shall be entitled to a representation, in the Senate of Canada, of Four Members, and (notwithstanding anything in this Act) in case of the admission of Newfoundland the

[1] On the Intercolonial Railway, see *The Intercolonial Railway*, by Sandford Fleming, 1876. Before the making of this railway the journey from Halifax to Montreal was by boat to Portland in the United States and thence by rail to Montreal.

[2] Prince Edward Island was admitted into the Union by Order-in-Council dated June 26, 1873.

British Columbia was admitted into the Union by Order-in-Council dated May 16, 1871.

Rupert's Land and the North-West Territory were admitted into the Union by Order-in-Council dated June 23, 1870.

A British Act of 1871 (34 & 35 Vic. ch. 28) made clear the right of the Parliament of Canada to establish Provinces in new Territories forming part of the Dominion, and a subsequent Act of 1886 (49 & 50 Vict. ch. 35) gave that Parliament power to provide representation in the Senate and House of Commons for Territories not yet included in any Province.

normal number of Senators shall be Seventy-six and their maximum number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from Twelve to Ten Members respectively, and the representation of each of those Provinces shall not be increased at any time beyond Ten, except under the provisions of this Act, for the appointment of Three or Six additional Senators under the direction of the Queen.

NOTE.—It has not been thought necessary for the purpose of this volume to reprint the schedules to the British North America Act.

REPORT OF COMMITTEE

FOR TRADE AND PLANTATIONS OF PRIVY COUNCIL[1] ON PROPOSED AUSTRALIAN CONSTITUTION.

DATED MAY 1, 1849.

[The text is as given in Lord Grey's *The Colonial Policy of Lord John Russell's Administration*, 1853, vol. i, Appendix 1, pp. 422 56. It will also be found in *Parl. Papers*, 1849, vol. xxxv.]

After remarking upon the contrast between the practice observed in the nineteenth century and the practice observed in earlier times respecting the establishment of systems of Civil Government in the Colonies, and pointing out the more liberal character of the former system, the Report proceeds :—

"But in sanctioning that departure from the general type or model of the earlier colonial Constitutions, it has been the practice of Parliament to recognize the ancient principle, and to record the purpose of resuming the former constitutional practice so soon as the causes should have ceased to operate, which in each particular case had forbidden the immediate observance of it. Nor has the pledge thus repeatedly given been forgotten. It has been redeemed in New South Wales, except so far as relates to the combination which has taken place there of the Council and Assembly into one Legislative House or Chamber. It has been redeemed with regard to New Zealand, although peculiar circumstances have required a temporary postponement of the operation in that Colony of the Act passed by Parliament for establishing in it a Representative Legislature.[2]

We are of opinion that the time has not yet arrived for conferring the franchise on the Colonists of Western Australia, because they are unable to fulfil the condition on which alone, it appears to us, such a grant ought to be made; the

[1] The Committee consisted of Mr. Labouchere, the President of the Board of Trade, Lord Campbell, Sir James Stephen, who had recently resigned the office of Permanent Under-Secretary at the Colonial Office, and Sir Edward Ryan, a retired Indian judge.

[2] On this see chap. ix of G. C. Henderson's *Life of Sir George Grey*, 1907

condition, that is, of sustaining the expense of their own Civil Government, by means of the local revenue, which would be placed under the direction and control of their representatives. Whenever the Settlers in Western Australia shall be willing and able to perform this condition, they ought, we apprehend, to be admitted to the full enjoyment of the corresponding franchises, but not till then.[1]

The Colonies of South Australia and Van Diemen's Land, being on the other hand at once willing and able to provide by local resources for the public expenditure of each, or at least for so much of that expenditure as is incurred with a view to colonial and local objects, the time has in our judgement arrived when Parliament may properly be recommended to institute in each of these Colonies a legislature, in which the representatives of the people at large shall enjoy and exercise their constitutional authority.

In submitting to Your Majesty this advice, we are only repeating an opinion so familiar and so generally adopted by all persons conversant with the Government of the British Colonies, that it would seem superfluous to support it by argument or explanation. The introduction of this constitutional principle into every dependency of the British Crown is a general rule sanctioned by a common and clear assent. The exception to that rule arises only when it can be shown that the observance of it will induce evils still more considerable than those which it would obviate and correct. We are aware of no reason for apprehending that such a preponderance of evil would follow on the introduction of such a change in South Australia and Van Diemen's Land. The contrary anticipation appears to be entertained by all those who possess the best means and the greatest powers of foreseeing the probable results of such a measure. We therefore recommend that, during the present session of Parliament, a Bill shall be introduced for securing to the

[1] It was not till 1870 that the Legislative Council of Western Australia consisted, with regard to two thirds of it, of elected members.

representatives of the people of South Australia and Van Diemen's Land respectively, their due share in the legislation of each of those Colonies.

We apprehend however that it would be found highly inconvenient to consider the question as it regards those two settlements, without at the same time adverting to the effects with which such a change in them must be followed in the whole range of the Australian Colonies.

New Holland is at present divided between the three Governments of New South Wales, South Australia, and Western Australia. The most cursory inspection of the maps and charts of those regions will sufficiently show, that as they shall become more populous and more extensively settled, it will be necessary to divide them into a greater number of distinct Colonies. But, confining our immediate attention to the case of New South Wales, we observe that the cities of Sydney and of Melbourne, lying at a great distance from each other, form the respective capitals of districts of great extent, separated from each other by diversities of climate and by some corresponding differences in their natural resources, and in the agricultural and commercial pursuits followed in each of them. The inhabitants of the southern districts have long and earnestly solicited that Melbourne should be made the seat and centre of a Colonial Government separated from that of Sydney: and so decided has this wish become of late, that on the recent general election of members of the Legislature of New South Wales collectively, the inhabitants of the southern district have virtually and in effect refused to make any such choice.[1] The reluctance which was at first so naturally entertained at Sydney to the proposed innovation, appears to have gradually but effectually yielded to the progress of knowledge and reasoning on the subject. The Governor and the Executive Council, the existing Legislature, and, as we believe, the great body of the Colonists, now favour the

[1] They elected Lord Grey as their representative.

contemplated division of their extensive territory into a northern and a southern Colony.

Nor is it surprising that such should have been the ultimate conclusion of such a debate. The inhabitants of countries recently and imperfectly settled are exposed to few greater social evils than that of the remoteness of the seat of Government from large bodies of the settlers. The effect is virtually to disfranchise a large proportion, if not a majority of the Colonists, by excluding them from any share in the management of public affairs, and in the inspection and control of the conduct of their rulers. In such circumstances the inconveniences of the centralisation of all the powers of Government are experienced in their utmost force. The population of the districts most distant from the metropolis are compelled to entrust the representation of their persons and the care of their local interests to settled residents at that metropolis, who possess but a very slight knowledge of their constituents and a faint sympathy with their peculiar pursuits and wants.

We propose therefore that Parliament should be recommended to authorise the division of the existing Colony of New South Wales into a northern and a southern Province. Sydney would be the capital of the northern division, which would retain the present name of New South Wales. Melbourne would be the capital of the southern division, on which we would humbly advise that Your Majesty should be graciously pleased to confer the name of Victoria . . .

The line of demarcation between New South Wales and Victoria would coincide with the existing boundary between the two districts into which for certain purposes the Colony is already divided. It would commence at Cape How, pursue a straight line to the nearest source of the river Murray, and follow the course of that river as far as the boundary which now divides New South Wales from South Australia.

In each of the two proposed provinces of New South Wales and Victoria we apprehend that provision ought now

to be made by Parliament for creating a Legislature, in which the representatives of the people should exercise their Constitutional authority and influence. We do not advise that resort should be had for these purposes to the ancient and unaided prerogatives of Your Majesty's Crown, because it is not competent to Your Majesty, in the exercise of that prerogative, to supersede the Constitutions [1] which Parliament has already established in the Australian Colonies. Parliamentary intervention is therefore indispensable.

If we were approaching the present question under circumstances which left to us the unfettered exercise of our own judgement as to the nature of the Legislature to be established in New South Wales, Victoria, South Australia, and Van Diemen's Land, we should advise that Parliament should be moved to recur to the ancient constitutional usage by establishing in each a Governor, a Council, and an Assembly. For we think it desirable that the political institutions of the British Colonies should thus be brought into the nearest possible analogy to the Constitution of the United Kingdom. We also think it wise to adhere as closely as possible to our ancient maxims of government on this subject, and to the precedents in which those maxims have been embodied. The experience of centuries has ascertained the value and the practical efficiency of that system of Colonial polity to which those maxims and precedents afford their sanction.[2] In the absence of some very clear and urgent reason for breaking up the ancient uniformity of design in the Government of the Colonial dependencies of the Crown, it would seem unwise to depart from that uniformity. And further, the whole body of constitutional

[1] The rules with regard to settled Colonies and Colonies obtained by cession or conquest were different, but in any case nothing but an Act of Parliament can alter an Act of Parliament, and once a legislature is established in a Colony, the position of the Crown is the same as its position in the United Kingdom. See Jenkyns' *British Rule and Jurisdiction beyond the Sea*, p. 7.

[2] It would be interesting to know on what data the committee drew this optimist conclusion as to the constitutional past of the British Colonies.

law, which determines the rights and duties of the different branches of the ancient Colonial Governments, having, within the lapse of time, been gradually ascertained and firmly established, we must regret any innovation which tends to deprive the Australian Colonies of the great advantage of possessing such a code so defined and so maturely considered.

But great as is the weight that we attach to these considerations, the circumstances under which we actually approach the question are such as to constrain us, however reluctantly, to adopt the opinion that the proposed Act of Parliament should provide for the establishment in each of the four Australian Colonies of a single House of Legislature only; one-third of the members of which should be nominated by Your Majesty and the remaining two-thirds elected by the Colonists . . . We recommend therefore that the proposed Act of Parliament should provide for convoking in each of the four Colonies a Legislature comprising two estates only, that is, a Governor and a single House, composed of nominees of the Crown and of the representatives of the people jointly. We also think that in South Australia and Van Diemen's Land, as in New South Wales and Victoria, the Legislatures now to be established ought to have the power of amending their own Constitutions,[1] by resolving either of these single Houses of Legislature into two Houses. Whatever the result may be in either of the four Colonies, Your Majesty will thus at least have the satisfaction of knowing that free scope has been given for the influence of public opinion in them all; and that this constitutional question has been finally adjusted in each, in accordance with that opinion.

For the same reason we think it desirable that the Legislatures now to be created should be entrusted with the power of making any other amendments in their own Constitutions which time and experience may show to be

[1] See on this power Jenkyns' *op. cit.*, pp. 72–5.

requisite.[1] We are aware of no sufficient cause for withholding this power, and we believe that the want of it in the other British Colonies has often been productive of serious inconvenience. On the other hand, we do not think it right that a subordinate Legislature should have the power of enlarging or altering any of the constitutional franchises conferred on it by Parliament, without either the express or the implied assent of the Queen, Lords and Commons of the United Kingdom. We should object to such an unrestrained permission, not for technical or legal reasons merely, but on broad and substantial grounds. Changes in the Constitution of any Colony may be productive of consequences extending far beyond the limits of the place itself. They may affect the interests of other British settlements adjacent or remote. They may be injurious to the less powerful classes of the local society. They may be prejudicial to Your Majesty's subjects in this country, or they may invade the rights of Your Majesty's Crown. We think therefore that no Act of any Australian Legislature which shall in any manner enlarge, retrench or alter the Constitution of that Legislature or its rights or privileges, or which shall be in any respect at variance with the Act of Parliament or other instruments under which the Legislature is constituted, ought to be of any validity until it had been expressly confirmed and finally enacted by Your Majesty in Council. And we are further of opinion that it should not be lawful to make any Order in Council so confirming any such Act until it had been laid before each House of Parliament for at least thirty days.

. . . . . .

We should think it prudent, if we thought it practicable, to confine the proposed Act to those provisions which are necessary for constituting Legislatures in the four Colonies

[1] Mr. Coulson, the parliamentary draftsman of the Australian Governments Act of 1850, said that 'the Bill in effect proposed one resolution, viz. that it was expedient to leave the form of their institutions to be dealt with by the Colonial Legislatures.' *Parl. Pap.* 1850.

in question, and for enabling those Legislatures to perform the duties to which they will be called. For we contemplate with great reluctance any departure from the general principle which leaves to the local Legislature of every Colony the creation of other local institutions, and the enactment of any laws which are to have their operation within the local limits of the Colony."

This course, however, appeared impossible, mainly because of the existence, however shadowy, of the District Councils, which it seemed wrong to abolish, and which might be made less unpopular if they did not involve a local rate. The Report proposed to hand over the territorial revenue which was received by the Treasury for the public service of the respective Colonies to these District Councils.

"Passing to the subject of a Civil List, we have to observe that the very large proportion of the revenue of New South Wales, at present withdrawn from the control of the Legislature by the permanent appropriation of Parliament, has been a continual subject of complaint and remonstrance in the Colony since the passing of the Constitution Act of 1842; and we cannot conceal our opinion that these complaints are not without some foundation. It appears to us hardly consistent with the full adoption of the principles of Representative Government that as to a large part of the public expenditure of the Colony, the Legislature should be deprived of all authority: nor does there appear to us to be any real occasion for imposing a restriction upon the powers of that body which manifests so much jealousy as to the manner in which those powers may be exercised. The expenditure thus provided for is all incurred for services in which the Colonists alone are interested. The Colonists themselves are mainly concerned in the proper and efficient performance of those services; and it appears to us that they ought to possess, through their representatives, the power of making such changes from time to time in the public establishments as circumstances

may require. But while we are of opinion that there is no sufficient reason for refusing to the Legislatures of the Colonies a control over the whole of their expenditure, we also think that great inconvenience and very serious evils might be expected to arise from leaving the whole of the public establishments to be provided for by annual vote.[1] In this country Your Majesty's Civil List is settled upon Your Majesty for life, and, in addition to this, Parliament has thought fit to provide, by a permanent charge on the Consolidated Fund for a very considerable part of the establishments kept up for the public service, including the whole of those of a judicial character, leaving to be defrayed by annual votes those charges only which have been regarded as requiring the more frequent revision of the Legislature. The reasons which have induced the British Parliament in this manner to withdraw various heads of expenditure from annual discussion, and to make provision for them in a manner which can only be altered by an Act of the whole Legislature, apply, as we apprehend, with much increased force in favour of adopting a similar policy in the Colonies. It is not to be denied that in these smaller societies party spirit is apt to run still higher than amongst ourselves, and that questions respecting the remuneration of public servants are occasionally discussed, rather with reference to personal feelings than to a calm consideration of the real interest of the community. We believe also, that true economy is promoted by giving to those who are employed in the public service some reasonable assurance for the permanence of their official incomes. It is thus only that efficient service can be secured in return for a moderate remuneration. With these views the arrangement which we should recommend is that Parliament should, in the first instance, charge upon the revenues of

[1] Much of the friction under the old colonial system had been brought about by the refusal of the Colonial Assemblies to vote a permanent Civil List. (See Greene, *op. cit.*, and *Documents relating to Colonial History of New York*, *passim*.)

the several Colonies an amount sufficient to defray the expenses of those services which it would be inexpedient to leave to be provided for by annual votes of the respective Legislatures, leaving, however to those Legislatures full power to alter this appropriation by laws to be passed in the usual form. It would remain for Your Majesty to determine what instructions should be given to the Governors of these Colonies, as to their assenting on behalf of the Crown to any laws which might be tendered to them by the Legislatures for repealing or altering any of the charges created by Parliament on the revenues of the respective Colonies.[1] We conceive that it might be advisable by such instructions to restrain the Governors from assenting to Acts making any alterations in the salaries of their own offices, or of those of the Judges, and some others of the public servants, unless these Acts contained clauses suspending their operation until they should be confirmed by Your Majesty's immediate authority. It appears to us that this course ought to be adopted, because we consider that the salaries of the principal officers of the Colonial Governments ought not to be changed without Your Majesty's direct concurrence; and because the present holders of some of the offices of lower rank have received their appointments under circumstances which give them a strong claim to the protection which would be thus afforded them. . . . We doubt not that such claims would be respected by the local Legislatures, whatever reductions they might see fit to make in other cases; but we think that Your Majesty ought to secure them even from the risk of a hasty and ill-considered decision to their prejudice, occasioned by some temporary excitement: subject to these qualifications, we are of opinion that complete control over the Colonial expenditure ought to be given to the respective Legislatures.

[1] A permanent Civil List was secured under the Acts of 1855 1856, under which responsible government was introduced.

There yet remains a question of considerable difficulty. By far the larger part of the revenue of the Australian Colonies is derived from duties on customs. But if, when Victoria shall have been separated from New South Wales, each province shall be authorised to impose duties according to its own wants, it is scarcely possible but that in process of time differences should arise between the rates of duty imposed upon the same articles in the one and in the other of them.[1] There is already such a difference in the tariffs of South Australia and New South Wales; and although, until of late, this has been productive of little inconvenience, yet with the increase of settlers on either side of the imaginary line dividing them, it will become more and more serious. The division of New South Wales into two Colonies would further aggravate this inconvenience, if the change should lead to the introduction of three entirely distinct tariffs, and to the consequent necessity for imposing restrictions and securities on the import and export of goods between them. So great indeed would be the evil, and such the obstruction of the intercolonial trade, and so great the check to the development of the resources of each of these Colonies, that it seems to us necessary that there should be one tariff common to them all, so that goods might be carried from the one into the other with the same absolute freedom as between any two adjacent counties in England.

We are further of opinion that the same tariff should be established in Van Diemen's Land also, because the intercourse between that Island and the neighbouring Colonies in New Holland has risen to a great importance and extent, and has an obvious tendency to increase. Yet fiscal regulations on either side of the intervening strait must of necessity check, and might perhaps to a great extent destroy, that beneficial trade.

[1] In fact in process of time Victoria enforced a strictly protective tariff, whilst that of New South Wales was based on Free Trade lines.

If the duties were uniform, it is obvious that there need be no restrictions whatever imposed upon the import or export of goods between the respective Colonies, and no motive for importing into one goods liable to duty, which were destined for consumption in another; and it may safely be calculated that each would receive the proportion of revenue to which it would be justly entitled, or, at all events, that there would be no departure from this to an extent of any practical importance.

Hence it seems to us that a uniformity in the rate of duties should be secured.

For this purpose we recommend that a uniform tariff should be established by the authority of Parliament,[1] but that it should not take effect until twelve months had elapsed from the promulgation in the several Colonies of the proposed Act of Parliament. That interval would afford time for making any financial arrangements which the contemplated change might require in any of them; and by adopting the existing Tariff of New South Wales (with some modifications to adapt it to existing circumstances) as the General Tariff for Australia, we apprehend that there would be no risk of imposing upon the inhabitants of these Colonies a table of duties unsuited to their actual wants. We should not however be prepared to offer this recommendation unless we proposed at the same time to provide for making any alteration in this general tariff, which time and experience may dictate, and this we think can only be done by creating some authority competent to act for all those Colonies jointly.

For this purpose we propose that one of the Governors of the Australian Colonies should always hold from Your Majesty a Commission constituting him the Governor-General of Australia.[2] We think that he should be autho-

[1] Such a tariff was proposed in the Bill of 1849, but the provisions regarding it were omitted in the following year.

[2] This proposal was afterwards adopted, but, without any other bond of union between the Colonies, led to no results.

rized to convene a body to be called the General Assembly of Australia, at any time and at any place within Your Majesty's Australian dominions, which he might see fit to appoint for the purpose. But we are of opinion that the first convocation of that body should be postponed until the Governor-General should have received from two or more of the Australian Legislatures addresses requesting him to exercise that power.[1]

We recommend that the General Assembly should consist of the Governor-General and of a single[2] House to be called the House of Delegates. The House of Delegates should be composed of not less than twenty, nor of more than thirty members. They should be elected by the Legislatures of the different Australian Colonies. We subjoin a schedule explanatory of the composition of this body: that is, of the total number of delegates, and of the proportion in which each Colony should contribute that number.

We think that Your Majesty should be authorized to establish provisionally, and in the first instance, all the rules necessary for the election of the delegates, and for the conduct of the business of the General Assembly, but that it should be competent to that body to supersede any such rules, and to substitute others, which substituted rules should not, however, take effect until they had received Your Majesty's sanction.

We propose that the General Assembly should also have the power of making laws for the alteration of the number of delegates,[3] or for the improvement in any other respect of its own Constitution. But we think that no such law

[1] It would have thus been in the power of two Colonies to compel the establishment of the General Assembly. This was remedied in the federal clauses of the Bill of 1850.

[2] Mr. Gladstone at once noted this weak point in the Bill afterwards drafted. 'He felt that there must be great difficulty in working a federal legislature, unless it was constituted upon the principle of a double chamber.' Hans. *Parl. Deb.*, 3rd Series, cv, p. 1139.

[3] Under this provision the Assembly might apparently have altered the proportion of members returned by the different Colonies.

should come into operation until it had actually been confirmed by Your Majesty.

We propose to limit the range of the legislative authority of the General Assembly to the ten topics which we proceed to enumerate. These are :-

1. The imposition of duties upon imports and exports.
2. The conveyance of letters.
3. The formation of roads, canals, or railways, traversing any two or more of such Colonies.
4. The erection and maintenance of beacons and lighthouses.
5. The imposition of dues or other charges on shipping in every port or harbour.
6. The establishment of a General Supreme Court, to be a Court of Original Jurisdiction, or a Court of Appeal from any of the inferior Courts of the separate Provinces.
7. The determining of the extent of the jurisdiction and the forms and manner of proceeding of such Supreme Court.
8. The regulation of weights and measures.
9. The enactment of laws affecting all the Colonies represented in the General Assembly on any subject not specifically mentioned in the preceding list, but on which the General Assembly should be desired to legislate by addresses for that purpose presented to them from the Legislatures of all those Colonies.
10. The appropriation to any of the preceding objects of such sums as may be necessary, by an equal percentage from the revenue received in all the Australian Colonies, in virtue of any enactments of the General Assembly of Australia.

By these means we apprehend that many important objects would be accomplished which would otherwise be unattainable; and, by the qualifications which we have proposed, effectual security would, we think, be taken against

the otherwise danger of establishing a Central Legislature in opposition to the wishes of the separate Legislatures, or in such a manner as to induce collisions of authority between them. The proceedings also of the Legislative Council of New South Wales with reference to the proposed changes in the Constitution, lead us to infer that the necessity of creating some such general authority for the Australian Colonies begins to be seriously felt."

. . . . . .

SCHEDULE 2.

Composition of the House of Delegates.

"Each Colony to send two members, and each to send one additional member for every 15,000 of the population, according to the latest census before the convening of the House.

On the present population the numbers would be as follows:

	Population last census.	Number of members.
New South Wales	155,000	12
Victoria	33,000	1
Van Diemen's Land deducting convicts .	46,000	5
South Australia	31,000	1
		25"

Although the proposals of the Privy Council and the clauses in the Bill of 1849 and 1850 which gave effect to them were a praiseworthy attempt to avoid a danger which afterwards became very serious, it must be confessed that they do not show any close grip of the subject, or sign that their authors realized how they could be worked in practice. Lord John Russell, indeed, finally confessed that the clauses relating to federation had to be withdrawn during the passage of the Bill of 1850, because of the difficulty of reconciling the respective rights and interests of New South Wales and of the lesser Colonies (Hans. *Parl. Deb.*, 3rd Series, cxiii, p. 623). At a time when a colonial reformer of the type of Sir William Molesworth 'did not see how a Federative Assembly could be admitted at all unless the intention was to separate these Colonies from the mother country' (Hans. cx. p. 800), matters were not yet ripe for the adoption of

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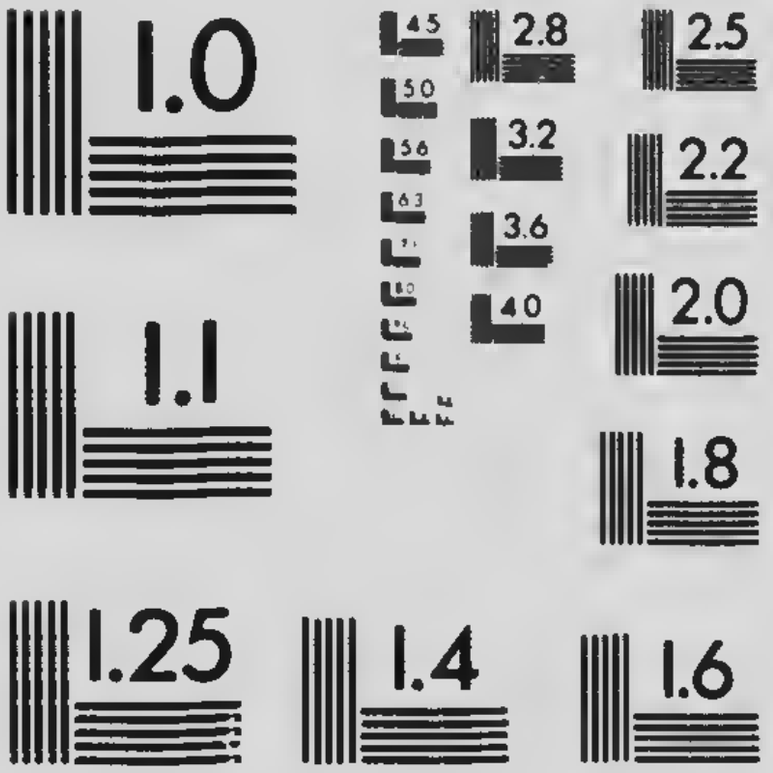

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the federal principle. Had the permissive clauses of the Bill of 1850 not been dropped, they would still in all probability have remained a dead letter.

It has been thought advisable to transcribe the greater portion of the Report of the Privy Council; because, though much of it is not concerned with the subject of federation, it throws valuable light on the strong and weak points of English Colonial Government in the middle of the nineteenth century.

The federal sections of the Australian Colonies Bills of 1849 and 1850 are given in Appendices A and B of Mr. C. D. Allin's *The Early Federation Movement of Australia*, 1907, pp. 419–423. Their fate can be traced in the pages of Hansard for these years.

THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

63 AND 64 VICT, CHAP. 12

An Act to constitute the Commonwealth of Australia.

[9th July, 1900.]

Whereas the people[1] of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God,[2] have agreed to unite in one indissoluble Federal Commonwealth[3] under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. This Act may be cited as the Commonwealth of Australia Constitution Act. Short Title.

[1] Note expression 'the people', following precedent of United States Constitution. The British North America Act merely spoke of 'the Provinces' as expressing their desire, &c.

[2] Considerable criticism had been evoked by the omission of any mention of God in the Bill of 1891. Section 116 was strengthened with a view to making clear that such mention did not imply denominational proclivities.

[3] The word 'Commonwealth' excited some criticism mainly on account of its republican associations; but it was defended by quotations from Shakespeare.

Act to extend to Queen's successors.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and sueeessors in the sovereignty of the United Kingdom.

Proclamation of Commonwealth.

3. It shall be lawful for the Queen with the advice of the Privy Council to declare by Proclamation [1] that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the Proclamation, appoint a Governor-General for the Commonwealth.

Commencement of Act.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effeet, on and after the day so appointed. But the Parliaments of the several Colonies may at any time after the passing of this Act make any sueh laws, to eome into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

Operation of the Constitution and Laws.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the eourts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in foree on all British ships,[2] the Queen's ships of war

[1] The Proclamation was made on September 17, 1900, and the Commonwealth began its life on January 1, 1901.

[2] This provision was taken from Sec. 20 of the Federal Council of Australasia Act of 1885. It was objected to by Mr. Chamberlain when the Bill was first brought to England as too wide; but in the face of the determination of the Australian delegates he waived his objections. See article by Mr. A. B. Keith, on 'Merchant Shipping Legislation in the Colonies', *Journal of Comparative Legislation*, 1909, p. 203. See *Peninsular and Oriental Steam Navigation Companies* v. *Kingston* [1903] A.C. 171; and *Merchant Service Guild of Australia* v. *A. Currie & Co. (Lim.)*, 5 C. L. R. 737. Sec. 5 only applies 'to cases where both the beginning and the end

excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Definitions.

6. 'The Commonwealth' shall mean the Commonwealth of Australia as established under this Act.

'The States'[1] shall mean such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies and Territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State'. 'Original States' shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of Federal Council Act. 48 & 49 Vict. c. 60.

7. The Federal Council of Australasia Act,[2] 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth or as to any Colony not being a State by the Parliament thereof.

Application of Colonial Boundaries Act. 58 & 59 Vict. c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895,[3] shall not apply to any Colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing Colony for the purposes of that Act.

of the voyage are in the Commonwealth', per Griffith, C.J. In the 1891 Bill the words 'and treaties' were added after the words 'the laws'.

[1] The word 'State' was chosen to emphasize the continuity of the separate life of the Colonies composing the Commonwealth, except with regard to such powers as are expressly transferred to the Commonwealth.

[2] On this, see Introduction, p. 53.

[3] The object of this Act was to confer general statutory authority upon the Crown to alter the boundaries of a self-governing Colony with its consent without having resort to the British Parliament. The Constitution itself now makes provision for the alteration of the boundaries of States, so that the Colonial Boundaries Act now only applies to the Commonwealth as a whole.

9. The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION.

This Constitution is divided as follows:—

Chapter I. The Parliament:
Part I. General:
„ II. The Senate:
„ III. The House of Representatives:
„ IV. Both Houses of the Parliament:
„ V. Powers of the Parliament:
Chapter II. The Executive Government:
„ III. The Judicature:
„ IV. Finance and Trade:
„ V. The States:
„ VI. New States:
„ VII. Miscellaneous:
„ VIII. Alteration of the Constitution:
The Schedule.

CHAP. I. The Parliament. Part I. General.

CHAPTER I.

THE PARLIAMENT.

Part I. General.

Legislative power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called 'the Parliament' or 'the Parliament of the Commonwealth'.

Governor-General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the

salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.[1]

Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

Sessions of Parliament. Prorogation and dissolution.

5. The Governor-General may appoint such times for holding the Sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

Summoning Parliament. First session.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs. The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Yearly session of Parliament.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

Part II. The Senate.

The Senate.

7. The Senate[2] shall be composed of Senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one Electorate.[3]

[1] This provision is not in Sec. 105 of the British North America Act. See note on that section.

[2] The term 'Senate' was employed in the Bill of 1891. It was afterwards proposed to call the Second Chamber 'The States Assembly'; but this proposal was negatived.

[3] This is the method known to the French as *Scrutin de liste*. The inten-

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland,[1] if that State be an Original State, may make laws dividing the State into divisions and determining the number of Senators to be chosen for each division, and in the absence of such provision the State shall be one Electorate.

Until the Parliament otherwise provides there shall be six Senators for each Original State. The Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators.

The Senators shall be chosen for a term of six years and the names of the Senators chosen for each State shall be certified by the Governor to the Governor-General.

Qualification of Electors.

8. The qualification of electors of Senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of Senators each elector shall vote only once.

Method of election of Senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing Senators, but so that the method shall be uniform for all the States. Subject to any such law the Parliament of each State may make laws prescribing the method of choosing the Senators for that State.

Times and Places.

The Parliament of a State may make laws for determining the times and places of election of Senators for the State.

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the

tion was to give expression to the interests of the individual States apart from particular districts; the effect seems to have been to give well-organized bodies, such as the Labour Party, the controlling voice.

[1] Queensland, it will be remembered, had held aloof from the successive Conventions; and at the meeting of Premiers in 1899 its representative explained that without such a provision the objections to federation would probably prove insurmountable. The Queensland Parliament, however, afterwards decided to follow the method of the other States in the election of Senators.

time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of Senators for the State.

Failure to choose Senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of Senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

Rotation of Senators.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the Senators chosen for each State into two classes, as nearly equal in number as practicable: and the places of the Senators of the first class shall become vacant at the expiration of the third year,[1] and the places of those of the second class at the expiration of the sixth year,[1] from the beginning of their term of service; and afterwards the places of Senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which [1] the places are to become vacant.

For the purposes of this section the term of service of a Senator shall be taken to begin on the first day of January [1] following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January [1] preceding the day of his election.

Further provision for rotation.

14. Whenever the number of Senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the

[1] Under the Constitution Alteration (Senate Elections) Act, 1906, the words 'three years' and 'six years' are substituted for 'the third year' and 'the sixth year'; and the words 'within one year before' are substituted for the words 'in the year at the expiration of which'—'July' is also substituted for 'January'.

places of Senators for the State as it deems necessary to maintain regularity in the rotation.

Casual vacancies.

15. If the place of a Senator becomes vacant before the expiration of his term of service,[1] the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor, as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any Senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

Qualifications of Senator.

16. The qualifications of a Senator shall be the same as those of a member of the House of Representatives.[2]

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a Senator to be the President of the Senate: and as often as the office of President becomes vacant the Senate shall again choose a Senator to be the President. The President shall cease to hold his office if he ceases to be a Senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of President.

18. Before or during any absence of the President, the

[1] This section only applies when there has been a *de jure* as well as a *de facto* election. (*Vardon* v. *O'Loghlin*, 5 C.L.R. 201.)

[2] The Bill of 1891 had made the age thirty, and the necessary period of residence five years.

Senate may choose a Senator to perform his duties in his absence.

Resignation of Senator.

19. A Senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

20. The place of a Senator shall become vacant if for two consecutive months of any session of the Parliament he, without permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth, the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the Senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each Senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.[1]

[1] It is obvious from a cursory glance at the clauses relating to the Australian Senate that both in the methods of its election and in its character it is essentially as democratic a body as is the House of Representatives. The reasons for this were as follows: The smaller States were determined not to become members of a federation wherein they could not find an equal voice in one House of Parliament; but at the same time there was a strong democratic sentiment throughout Australia, in the smaller no less than in the greater States, that it would be treason to the democratic principle to give large powers to a Second Chamber unless it were organized on a completely democratic basis. The Bill of 1891 had proposed to give the election of the members of the Senate to the State Legislatures; but, with the Legislative Council in some of the States nominated bodies, such a method of choice was impossible; and it only remained to put the power in the hands of the electors to the House of Representatives, arranging them differently so as possibly to produce different results. Whatever, then, the merits of the Australian Senate in other ways, from the circumstances of its origin it can hardly be expected to fulfil the ordinary purposes of a Second Chamber.

Part III. House of Representatives.

Part III. The House of Representatives.

Constitution of House of Representatives.

24 The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the Senators.[1]

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the Senators.[2]

(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota: and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But, notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as to races disqualified from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

[1] The reason of this will become evident when the provision with regard to deadlocks is considered.

[2] Under Article I, sec. 2, of the American Constitution representatives were apportioned among the several States according to their respective numbers, which were determined by adding to the whole number of free persons, excluding Indians untaxed, three-fifths of all other persons.

Representatives in First Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:

New South Wales . . .	Twenty-three:
Victoria	Twenty:
Queensland	Eight:
South Australia	Six:
Tasmania	Five:

Provided that if Western Australia is an Original State the numbers shall be as follows:

New South Wales . . .	Twenty-six:[1]
Victoria	Twenty-three:[1]
Queensland	Nine:
South Australia	Seven:
Western Australia . .	Five:
Tasmania	Five.

Alteration of number of Members.

27. Subject to this Constitution the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Duration of House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Electoral Divisions.

29. Until the Parliament of the Commonwealth otherwise provides,[2] the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

[1] In 1910 New South Wales had twenty-seven members and Victoria twenty-two.

[2] The subject was dealt with by the Commonwealth Electoral Acts 1902–1905.

Qualification of electors.

30. Until the Parliament otherwise provides,[1] the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Application of State laws.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Writs for general election.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

Writs for vacancies.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker, or if he is absent from the Commonwealth, the Governor-General in Council may issue the writ.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

(i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits

[1] The Commonwealth Parliament in 1902, Act No. 8, enacted adult suffrage. By this time all the States, following the lead of South Australia, had given votes to women, except in the case of voting for the Legislative Council of Victoria.

of the Commonwealth as existing at the time when he is chosen:

(ii.) He must be a subject of the Queen, either natural-born or for at least 5 years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of Speaker.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker, or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

Part IV. Both Houses of the Parliament.

Part IV. Both Houses of the Parliament.

Right of electors of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Oath or affirmation of allegiance.

42. Every senator and every Member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

Members of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Disqualification.

44. Any person who—

(i.) is under any acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power: or

(ii.) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) is an undischarged bankrupt or insolvent: or

(iv.) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.

But subsection iv does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Vacancy on happening of disqualification.

45. If a senator or member of the House of Representatives—

(i.) becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii.) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

Penalty for sitting when disqualified.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.[1]

Allowance to members.

48. Until the Parliament otherwise provides, each senator

[1] By the Electoral Act, No. 19 of 1902, the determination of questions respecting contested elections was transferred to the High Court.

and each member of the House of Representatives shall receive an allowance of four hundred pounds a year,[1] to be reckoned from the day on which he takes his seat.

Privileges, &c. of Houses.

49. The powers,[2] privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Rules and orders.

50. Each House of the Parliament may make rules and orders with respect to—

(i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:

(ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

Part V.

Part V. Powers of the Parliament.

Powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

Legislative powers of the Parliament.

(i.) Trade and commerce with other countries, and among the States:[3]

(ii.) Taxation;[4] but so as not to discriminate between States or parts of States:

[1] By Act No. 5 of 1907 this sum has been raised to £600.

[2] It will be noted that under this section the powers of the Commonwealth Parliament are more extensive than those of the Dominion Parliament.

[3] Under a Bill to amend the Constitution which passed through the Parliament in 1910 and will be submitted to a Referendum of the electors in 1911, the words "with other countries and among the States" are omitted.

[4] A Federal Customs Tariff Act was enacted in 1902 No. 14. It was held in *The King* v. *Barger, the Commonwealth* v. *Mackay* 6 C. L. R. 41 that the Excise Tariff Act (No. 16 of 1906) was *ultra vires* on the part of the Commonwealth, because, under the guise of a tariff law, it dealt with questions relating to labour and thus came in conflict with Sec. 55 of the Act. But see Note on Subsection 35.

The States possess concurrent powers with regard to taxation, except as to the imposition of duties of Customs and Excise.

(iii.) Bounties[1] on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv.) Borrowing money on the public credit of the Commonwealth:

(v.) Postal, telegraphic, telephonic, and other like services:

(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii.) Lighthouses, lightships, beacons and buoys:

(viii.) Astronomical and meteorological observations:

(ix.) Quarantine:

(x.) Fisheries[2] in Australian waters beyond territorial limits:

(xi.) Census and statistics:

(xii.) Currency, coinage, and legal tender:

(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv.) Insurance,[3] other than State insurance; also State insurance extending beyond the limits of the State concerned:

(xv.) Weights and measures:

(xvi.) Bills of exchange and promissory notes:

(xvii.) Bankruptcy and insolvency:

(xviii.) Copyrights, patents of inventions and designs, and trade marks:[4]

(xix.) Naturalization and aliens:

(xx.) Foreign corporations, and trading or financial

[1] See The Preservation of Australian Industries Act, No. 9 of 1906.

[2] This power was possessed by the Federal Council of Australasia.

[3] Insurance was added to the subjects entrusted to the Federal Parliament in the Bill of 1898.

[4] Acts were passed with regard to the subjects in 1905; 1903 and 1906; and 1905. The Trademarks must be really Trademarks and not Union labels. See *Attorney-General for New South Wales* v. *Brewery Employees' Union*, 6 C.L.R. 469.

corporations formed within the limits of the Commonwealth:[1]

(xxi.) Marriage:

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii.) Invalid and old-age pensions:[2]

(xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:[3]

(xxvii.) Immigration and emigration:[4]

[1] Under the amendment of the Constitution this subsection is altered so as to run:

Corporations, including

(a) the creation, dissolution, regulation, and control of corporations,

(b) Corporations formed under the law of a State (except any corporation formed solely for religious, charitable, scientific, or artistic purposes, and not for the acquisition of gain by the Corporation or its members), including their dissolution, regulation or control; and

(c) foreign corporations, including their regulation and control.

The attempt of the Australian Industries Act of 1906 to extend the meaning of subsection xx. was held invalid in *Huddart Parker & Co.* v. *Moorhead*, 8 C.L.R. 330.

[2] This subsection was first inserted in the Bill at the Melbourne Session of the Convention in 1898. An Old Age Pension Appropriation Act was passed in 1908 (No. 18).

[3] This provision is not in the Bill of 1891.

[4] Under the Immigration Restriction Act, No. 17 of 1901, immigrants must be able to write fifty words in a 'prescribed' language; and will be excluded if under a contract to perform manual labour. Exceptions can be made in the case of workmen possessing special skill required in Australia; and No. 19 of 1905 provides that immigrants under contract may land when the contract is in writing, and made by or on behalf of some one named in the contract and resident in Australia, and is also approved by the responsible Minister. The necessity of possessing special skill is removed in the case of British subjects; but a contract can only be approved if the current wages are payable, and if the contract is not made in contemplation of an industrial dispute.

(xxviii.) The influx of criminals:

(xxix.) External affairs:[1]

(xxx.) The relations of the Commonwealth with the islands of the Pacific:[2]

(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:[3]

(xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:[4]

(xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:[4]

(xxxiv.) Railway construction and extension in any State with the consent of that State:

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:[5]

[1] These words are somewhat vague and have been considered to suggest some withdrawal of Imperial powers. The intention may have been to meet cases such as the one which afterwards arose between the South Australian Government and the Dutch Consul. The South Australian Government maintained that the Commonwealth Government had no *locus standi*, and that it could only discuss the question with the Imperial Government. Mr. Chamberlain, without deciding whether 'external affairs' included the subject of treaties, held that the effect of the Commonwealth Act was to create a new State or nation able 'to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any Foreign Power'. (See Parl. Papers, 1902, Cd. 1587.)

[2] The Federal Council of Australasia had never exercised this power given to it by the Act of 1885. By an Act of 1901, No. 16, the entrance of Pacific labourers into Australia was forbidden after March 31, 1904.

[3] No. 13 of 1901 contains drastic provisions with regard to the exercise of this power.

[4] These provisions were not in the 1891 Bill.

[5] Under the amendment of the Constitution this subsection runs as follows: 'Labour and employment including (a) the wages and conditions of labour and employment in any trade, industry, or calling; and (b) the prevention and settlement of industrial disputes including disputes in relation to employment on or about railways the property of any state.' In consequence of this subsection the Commonwealth Conciliation and Arbitration Act 1904 and the cases under it will be no longer of practical importance.

(xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:[1]

(xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom[2] or by the Federal Council of Australasia:

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.[3]

Exclusive powers of the Parliament.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii.) Matters relating to any department of the public service the control of which is by this Constitution

[1] Cf. Sec. 94 of British North America Act.

[2] It is not clear how the concurrence of the States' Parliaments can affect powers only possessed by the British Parliament.

[3] Under the new Bill a new subsection is added: '(xl.) Combinations and monopolies in relation to the production, manufacture or supply of goods or services.' Under another Bill a new section is also added.

51 A. When each House of the Parliament in the same Session has by Resolution declared that the business or industry of producing or supplying any specified goods, or of supplying any specified services, is the subject of a monopoly, the Parliament shall have power to make laws for carrying on the industry or business by or under the control of the Commonwealth, and acquiring for that purpose any property used in connexion with the industry or business.

transferred to the Executive Government of the Commonwealth:

(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Powers of the Houses in respect of legislation.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate.[1] But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein.[2] And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. [3] The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bill.

55. [3] Laws imposing taxation shall deal only with the

[1] Some opposition to this was at first made in the interests of the States. The clause as it stands is the outcome of much discussion. The Bill of 1897 said, 'Proposed laws *having for their main object*,' &c.

[2] The Act here follows a precedent which had been at work in the South Australian Parliament, and had also been adopted in Western Australia. It was adopted in Victoria in 1903.

[3] These are the familiar provisions directed against 'tacking'. See note on Section 51, subsection 1.

imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.[1]

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may con-

[1] The scandals under the old system were emphasized in Lord Durham's Report. Since the Act of Union of the Canadas in 1840 the practice enjoined in this clause has prevailed throughout the self-governing British Empire.

vene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.[1]

Royal assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion,

[1] Few subjects in the discussions regarding the Commonwealth presented greater difficulties than the question what to do in case of deadlocks between the two Houses. The Bill of 1891 had shirked the difficulty; but, considering that it was intended to set on foot a Second Chamber, which should both represent the federal principle and be as essentially democratic in its constitution as was the House of Representatives, it was impossible to ignore the risks of a possible deadlock. The question received exhaustive discussion at the Sessions of 1897 and 1898. The main dispute lay between the adoption of the principle of a dissolution, whether consecutive or simultaneous, of both Houses, or of a national referendum. (The latter was unpopular with the small States because it ignored the federal element in the Constitution.) There was a majority in favour of some kind of referendum; but with its advocates supporting, some a national and some a dual referendum, i.e. such a referendum as should secure a majority in the individual States, the supporters of dissolution won the day. By the Bill as it left the Convention a three-fifths majority at the joint sitting was necessary; but this provision was very unpopular in New South Wales, and was abandoned after the meeting of the Premiers in 1899.

The provision with regard to the dissolution of the Senate is a new step in procedure in the evolution of Federal Governments; except so far as it has been anticipated by the Swiss provisions in the case of a proposed amendment of the Constitution set out in the note to Section 128.

but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Recommendations by Governor-General.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Disallowance by the Queen.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Signification of Queen's pleasure on Bills reserved.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General has known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

CHAP. II. The Government.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

Executive power.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Provisions referring to

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring

to the Governor-General acting with the advice of the Federal Executive Council. Governor-General.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Ministers of State.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.[1] Ministers to sit in Parliament.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.[2] Number of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year. Salaries of Ministers.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.[3] Appointment of civil servants.

[1] See Introduction, p. 64. This rule, which in Great Britain is implied, was expressly set out in Victoria and South Australia.

[2] The Departments are that of External Affairs; that of the Attorney-General; that of Defence; that of Trade and Customs; that of the Postmaster-General; that of Home Affairs; and that of Treasury. There are generally, in addition, two or three Ministers without portfolio. The Prime Minister has on several occasions held the Department of External Affairs; but there is no rule as to which Department he should hold. The federal character of the Constitution is, to some extent, represented in the personnel of the Cabinet.

[3] By an Act of 1902, for the Regulation of the Public Service, a Public

Command of naval and military forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:—

Posts, telegraphs, and telephones:
Naval and military defence:
Lighthouses, lightships, beacons, and buoys:
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Certain powers of Governors to vest in Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAP. III. The Judicature.

CHAPTER III.

THE JUDICATURE.

Judicial power and Courts.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia,[1] and in such other federal courts as

Service Commissioner was set on foot with very extensive powers, whose office it is to recommend for all Civil Service appointments within the Commonwealth; it was also enacted that the Public Service should be mainly recruited by examination.

[1] In the United States a complete system of State Courts was established, ramifying all over the Union and exercising exclusive jurisdiction in all cases arising under Federation Statutes; the State Courts remaining independent in State matters with no appeal from their decisions. In

the Parliament creates, and in such other courts as it invests with federal jurisdiction The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judges' appointment, tenure, and remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

Appellate jurisdiction of High Court.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

(i.) Of any Justice or Justices exercising the original jurisdiction of the Hi Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

Canada the same Courts deal with federal and provincial questions, and the Supreme Court hears appeals from all other Courts. The Australian High Court, it will be seen, occupied a middle position between these two extremes. Under the Judiciary Act, No. 6 of 1903, the High Court at first consisted of a Chief-Justice and two Judges. It has since been enlarged by the addition of two Judges.

But no exeeption or regulation preseribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in whieh at the establishment of the Commonwealth an appeal lies from sueh Supreme Court to the Queen in Counеil.

Until the Parliament otherwise provides, the eonditions of and restrietions on appeals to the Queen in Counеil from the Supreme Courts of the several States shall be applieable to appeals from them to the High Court.

Appeal to Queen in Council.

74. No appeal shall be permitted to the Queen in Counеil from a deeision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall eertify that the question is one whieh ought to be determined by Her Majesty in Counеil.[1]

The High Court may so certify if satisfied that for any speeial reason the eertifieate should be granted, and there-

[1] See Introduction, pp. 58, 66-7, on history of this clause. As framed at the Adelaide Convention it prohibited any appeal to the Privy Council, either from the State Courts or the Federal Courts, and the exception only applied to appeals from the Federal Courts. (The words were, 'No appeal shall be allowed to be given in Counеil from any Court of any State, or from the High Court or any other Federal Court, except that the Queen may, in any matter in whieh the public interests of the Commonwealth, or of any State, or of any other part of her dominions, are concerned, grant leave to appeal to the Queen in Council from the High Court.') In its final form, however, the prohibition only expressly applied to appeals from the High Court. The curious spectacle was thus provided of the Privy Council and the High Court giving directly contradictory decisions on the same question. The former held that a State Government could levy income tax on the income of a federal official, the latter that it could not (compare *Deakin* v. *Webb* (1 C. L. R. 585) and *Webb* v. *Outtrim* (L. R. [1907] A. C. 81). The matter has been settled by the Commonwealth (Act of 1907, No. 8) abolishing the concurrent jurisdiction of the Courts of the States with regard to questions relating to the constitutional rights and powers of the Commonwealth and of the States *inter se*.

upon an appeal shall lie to Her Majesty in Council on the question without further leave.[1]

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.[2]

Original jurisdiction of High Court.

75. In all matters—

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:[3]

(v.) In which a writ of Mandamus or prohibition or an

[1] On this section see Chief-Justice Sir S. Griffith's judgement in *Baxter v. Collector of Taxes of New South Wales* (4 C. L. R., Part 2, 1103).

In the Bill of 1891 the matter was dealt with as follows: 'The Parliament of the Commonwealth may provide by law that any appeals which have heretofore been allowed from any judgment, decree, or sentence of the Highest Court of final resort of any State to the Queen in Council, shall be brought and heard and determined by the Supreme Court of Australia, and the judgment of the Court in all such cases shall be final and conclusive. Notwithstanding the provisions of the two last preceding sections or any law made by the Parliament of the Commonwealth in pursuance thereof, the Queen may in any case in which the public interests of the Commonwealth or of any State, or of any other part of the Queen's dominions are concerned, grant leave to appeal to herself in Council against any judgment of the Supreme Court of Australia.'

[2] This proviso was inserted at the suggestion of the Home Government; at first sight its practical effect would not seem likely to be great; but it is possible that the necessity for sanction in England may deter Australian Ministers from such legislation.

[3] Cf. amendment XI to the United States Constitution.

injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i.) Arising under this Constitution, or involving its interpretation:[1]

(ii.) Arising under any laws made by the Parliament:

(iii.) Of Admiralty and maritime jurisdiction:

(iv.) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i.) Defining the jurisdiction of any federal court other than the High Court:

(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii.) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

[1] See Acts No. 6 of 1903, and No. 8 of 1907. See also above, note on Sec. 74.

CHAPTER IV.

FINANCE AND TRADE.

Consolidated Revenue Fund.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

Money to be appropriated by law.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

Transfer of officers.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the

time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

Transfer of property of State.

85. When any department of the public service of a State is transferred to the Commonwealth—

(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.[1]

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.[2] Uniform duties of customs.

[1] For the history of 'the Braddon clause' see Introduction, pp. 59, 63 and 64. The clause, without the limit of time, was adopted at the Melbourne Session on March 11th by a majority of three; Sir Edward Braddon having affirmed that unless this provision was made he saw no hope whatever of recommending the Bill to the people of Tasmania. As at first drafted, the clause limited expenditure on the part of the Commonwealth, in the exercise of its original powers to one-twentieth, and to four-twentieths in making good the net loss on the services taken over. But Sir E. Braddon afterwards amended his own clause in the interests of elasticity. As amended after the meeting of Premiers in 1899, the arrangement came to an end in 1910. A proposed Bill of 1909 for the alteration of the Constitution so as to secure a permanent payment of 25s. to the States for every head of their respective populations was rejected at a referendum of the electors, but an Act making such payment for a period of ten years has now become law.

[2] Such duties were imposed by Act No. 14 of 1902.

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

(i.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii.) The Commonwealth shall debit to each State—

(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(*b*) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties[1] on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Exceptions as to bounties.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

Trade within the Common-

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether

[1] This power was exercised by 'The Preservation of Australian Industries Act', No. 9 of 1906.

by means of internal carriage or ocean navigation, shall be absolutely free.[1] Wealth to be free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides— Payment to States for five years after uniform tariffs.

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

(ii.) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth. Distribution of surplus.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs[2] on goods passing into that State and not Customs duties of Western Australia.

[1] Compare Section 121 of British North America Act.

[2] See Introduction, p. 66. Sir John Forrest, the Western Australia representative, was not in favour of making a special case of his Colony; but,

originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

as its circumstances were special, it proved impossible to protect its interests by any general provision applying to the States equally.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.[1]

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.[2]

Inter-State Commission.

101. There shall be an Inter-State Commission,[3] with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue

[1] On the limitation to the meaning of this section given by the High Court, see *The Federated Government Railway and Tramway Servants' Association* v. *New South Wales Railway Traffic Employés' Association*, 4 C. L. R. 488.

[2] Few subjects gave rise to more division of opinion and received more careful treatment at the convention debates than the question of the respective rights of the riparian owners, and of third parties interested in the waters of Australia (see especially *Convention Debates*, Melbourne, 1898, pp. 376-642). The 100th clause was substituted for a subsection in the 1897 Bill giving the federal legislature 'the control and regulation of the navigation of the river Murray, and the use of the waters thereof from where it first forms the boundary between Victoria and New South Wales to the sea.'

[3] The first suggestion for an Inter-State Commission was made at the Adelaide Session in 1897; but its establishment was then made optional. With the reference to it of the subject of unfair or preferential railway rates its creation was made obligatory. Precedents existed in the Inter-State Commerce Commission of the United States set on foot in 1887, and the English Railway Commission of 1888. In spite of this express enactment an Inter-State Commission had not been set on foot up to the end of 1910. A Bill constituting one was introduced into the Senate in 1909; but had not passed through Parliament at the time of the dissolution.

and unreasonable,[1] or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

Saving of certain rates.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

105. The Parliament may take over from the States their

[1] The Supreme Court of the United States has held that 'subject to the two leading propositions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced', these words leave 'common carriers as they were at the common law, free to make special rates . . . and generally to manage their important interests upon the same principles, which are regarded as sound, and are generally adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any Court or Board of public administration; and within the limitations suggested it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business'. Quoted in Memorandum on South African Federation, Parl. Papers [Cd. 3564] 1907.

public debts[1] as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof: and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

Taking over public debts of States.

CHAPTER V.

CHAP. V.

THE STATES.[2]

The States.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.[3]

Saving of Constitutions.

[1] The words 'as existing at the establishment of the Commonwealth' are omitted by the Constitution Alteration (State Debts) Act, 1909.

[2] The status of the States is carefully considered in Harrison Moore's *Commonwealth of Australia*, 2nd ed., 1910, pp. 345-56. The conclusion reached is that there must be express or implied enactment in the Commonwealth Act for any powers formerly enjoyed by the State Governments, as well as Parliaments, to be taken away. On the position of Commonwealth and State officials with reference to the States and the Commonwealth, note the principle of the immunity of instrumentalities, which forbids the interference, direct or indirect, with the free exercise of powers given by the Constitution. See Harrison Moore, *op. cit.*, pp. 421-37, and cases there cited. (It was on the subject of the immunity of federal officials from taxation that the High Court of the Commonwealth and the Privy Council gave directly contrary decisions.)

[3] In the draft Bill of 1891 it was provided that all communications with the Crown by the States should be made through the Governor-General; but such a clause was negatived at the Federal Convention at Adelaide; and in matters not expressly transferred to the Commonwealth Australia still speaks with six voices instead of one. It was not till 1910 that a High Commissioner for the Commonwealth entered upon his duties in Great Britain.

Saving of Power of State Parliaments.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Saving of State laws.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

Inconsistency of laws.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.[1]

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State;

[1] By an Act of 1910 giving effect to an agreement with South Australia the Northern Territory was taken over by the Commonwealth from January 1, 1911. Another Act, No. 27 of 1910, provides for the administration of the land in question.

but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

Intoxicating liquids.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

States may not raise forces. Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.[1]

States not to coin money.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.[1]

Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[2]

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.[3]

Recognition of laws, &c. of States.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

Protection of States from invasion and violence.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

[1] Cf. Article I, Section 10, of United States' Constitution.

[2] This clause seems out of place in the chapter on the States.

[3] On this Section see Harrison Moore, *op. cit.*, pp. 331 4.

Custody of offenders against laws of the Commonwealth.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted[1] of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

CHAP. VI. New States.

CHAPTER VI.

NEW STATES.

New States may be admitted or established.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

Government of territories.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth,[1] or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the

[1] By the Papua Act, No. 9 of 1905, the Commonwealth accepted British New Guinea as a territory under its authority, and provided for its government.

Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII.

CHAP. VII. Miscellaneous.

MISCELLANEOUS.

Seat of Government.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.[1]

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

Power to Her Majesty to authorise Governor-General to appoint deputies.

126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

[1] The seat of Government has, after much hesitation, been fixed in the Yass Canberra District. The area which is to be handed over to the Commonwealth as federal territory consists of nine hundred square miles.

It was only after that the Bill had not been accepted in New South Wales by the required number of votes in 1898 that this provision was inserted. Before this it had been consistently maintained that the matter was one which should be decided by the Commonwealth Parliament.

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, original natives shall not be counted.

CHAP. VIII. Alteration of Constitution.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.[1]

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to

[1] On the introduction of the principle of the referendum see Introduction, p. 65.

The provisions with regard to the alteration of the Constitution set out in Article V of the Constitution of the United States are as follows: The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided . . . that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Compare Article 20 of the Swiss Constitution: Lorsqu'une section de l'assemblee fédérale decrète la revision (totale) de la constitution fédérale et que l'autre section n'y consent pas, ou bien lorsque cinquante mille citoyens Suisses ayant droit de voter demandent la revision (totale), la question de savoir si la constitution fédérale doit être revisée est, dans l'un comme dans l'autre cas, soumise à la votation du peuple Suisse, par oui ou par non.

Si, dans l'un ou l'autre de ces cas, la majorité des citoyens Suisses, prenant part à la votation, se prononce pour l'affirmative, les deux conseils seront renouvelés pour travailler à la revision.

The alteration of the Canadian Constitution rests, as we have seen, with the British Parliament.

The South African Union, being a unitary Government and not a federation, its Parliament has full powers to alter the Constitution. In certain cases, however, such power cannot be exercised till after the expiration of a period of ten years from the coming into force of the Act; and, in certain other cases, a majority of two-thirds is required of the total number of both Houses voting at a joint sitting.

vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

SCHEDULE.

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*

SOUTH AFRICA ACT, 1909.

[9 EDW. 7. CH. 9.]

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CHAPTER 9.

An Act to constitute the Union of South Africa.

[20th September, 1909.]

WHEREAS it is desirable for the welfare and future progress of South Africa that the several British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland:

And whereas it is expedient to make provision for the union[1] of the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony on terms and conditions to which they have agreed by resolution of their respective Parliaments, and to define the executive, legislative, and judicial powers to be exercised in the government of the Union:

And whereas it is expedient to make provision for the establishment of provinces with powers of legislation and administration in local matters and in such other matters as may be specially reserved for provincial legislation and administration:

And whereas it is expedient to provide for the eventual admission into the Union or transfer to the Union of such parts of South Africa as are not originally included therein:[2]

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

Short title.

1. This Act may be cited as the South Africa Act, 1909.

Definitions.

2. In this Act, unless it is otherwise expressed or implied, the words "the Union" shall be taken to mean the

[1] The keynote of the Act is that it established a Union, not a Federation.
[2] Rhodesia was mainly in question.

Union of South Africa as constituted under this Act, and the words "Houses of Parliament," "House of Parliament," or "Parliament" shall be taken to mean the Parliament of the Union.

Application of Act to King's successors

3. The provisions of this Act referring to the King shall extend to His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland.

II. Union.

Proclamation of Union.

4. It shall be lawful for the King, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, hereinafter called the Colonies, shall be united in a Legislative Union under one Government under the name of the Union of South Africa. On and after the day appointed by such proclamation the Government and Parliament of the Union shall have full power and authority within the limits of the Colonies, but the King may at any time after the proclamation appoint a governor-general for the Union.

Commencement of Act.

5. The provisions of this Act shall, unless it is otherwise expressed or implied, take effect on and after the day so appointed.

Incorporation of colonies into the Union.

6. The colonies mentioned in section four shall become original provinces of the Union under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State, as the case may be. The original provinces shall have the same limits as the respective colonies at the establishment of the Union.

Application of 58 & 59 Vict. c. 34, &c.

7. Upon any colony entering the Union, the Colonial Boundaries Act, 1895, and every other Act applying to any of the Colonies as being self-governing colonies or colonies with responsible government, shall cease to apply to the

colony, but as from the date when this Act takes effect every such Act of Parliament shall apply to the Union.[1]

III.—Executive Government.[2]

Executive power.

8. The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person or by a governor-general as His representative.

Governor-General.

9. The Governor-General shall be appointed by the King, and shall have and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him.

Salary of Governor-General.

10. There shall be payable to the King out of the Consolidated Revenue Fund of the Union for the salary of the Governor-General an annual sum of ten thousand pounds. The salary of the Governor-General shall not be altered during his continuance in office.

Application of Act to Governor-General.

11. The provisions of this Act relating to the Governor-General extend and apply to the Governor-General for the time being or such person as the King may appoint to administer the government of the Union. The King may authorise the Governor-General to appoint any person to be his deputy within the Union during his temporary absence, and in that capacity to exercise for and on behalf of the Governor-General during such absence all such powers and authorities vested in the Governor-General as the Governor-General may assign to him, subject to any limitations expressed or directions given by the King; but the appointment of such deputy shall not affect the exercise by the Governor-General himself of any power or function.

Executive Council.

12. There shall be an Executive Council to advise the Governor-General in the government of the Union and the

[1] See on this, note on similar provision in Commonwealth Act, p. 187.

[2] See suggestive remarks of Mr. R. Brand, *The Union of South Africa*, p. 51, as to importance of Executive in South Africa.

members of the council shall be chosen and summoned by the Governor-General and sworn as executive councillors, and shall hold office during his pleasure.

Meaning of Governor-General in Council.

13. The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Executive Council.

Appointment of ministers.

14. The Governor-General may appoint officers not exceeding ten in number to administer such departments of State of the Union as the Governor-General in Council may establish;[1] such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provided, no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament.[2]

Appointment and removal of officers.

15. The appointment and removal of all officers of the public service of the Union shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by this Act or by a law of Parliament to some other authority.

Transfer of executive powers to Governor-General in Council.

16. All powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in the Governor or in the Governor in Council, or in any authority of the Colony, shall, as far as the same continue in existence and are capable of being exercised after

[1] The ministry consists of the Prime Minister (who is also Minister of Agriculture); the Minister of Railways and Harbours; the Minister of the Interior, Mines and Defence; the Minister of Justice; the Minister of Education (other than primary and secondary); the Minister of Finance; the Minister of Lands; the Minister of Native affairs; the Minister of Commerce and Industries; and the Minister of Public Works, Posts and Telegraphs. (There is also one Minister without a portfolio.)

[2] This provision was taken from the Commonwealth Act. In Natal, under the Constitution of 1893, Ministers had to become members of Parliament within four months.

the establishment of the Union, be vested in the Governor-General or in the Governor-General in Council, or in the authority exercising similar powers under the Union, as the case may be, except such powers and functions as are by this Act or may by a law of Parliament be vested in some other authority.

Command of naval and military forces.

17. The command in chief of the naval and military forces within the Union is vested in the King or in the Governor-General as His representative.

Seat of Government.

18. Save as in section twenty-three excepted, Pretoria shall be the seat of Government of the Union.[1]

IV.—Parliament.

Legislative power.

19. The legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly.

Sessions of Parliament.

20. The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone: provided that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and provided further that the dissolution of the Senate shall not affect any senators nominated by the Governor-General in Council.

Summoning of first Parliament.

21. Parliament shall be summoned to meet not later than six months after the establishment of the Union.[2]

Annual session of Parliament.

22. There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not intervene between the last sitting of Parliament in one session and its first sitting in the next session.

[1] i.e. of the Executive Government.

[2] The Parliament was opened by the Duke of Connaught on November 4, 1910: the Union having been established on May 31.

23. Cape Town shall be the seat of the Legislature of the Union.[1] Seat of Legislature.

Senate.

24. For ten years after the establishment of the Union the constitution of the Senate shall, in respect of the original provinces, be as follows:— Original constitution of Senate.

(i) Eight senators shall be nominated by the Governor-General in Council, and for each Original Province eight senators shall be elected in the manner hereinafter provided:

(ii) The senators to be nominated by the Governor-General in Council shall hold their seats for ten years. One-half of their number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. If the seat of a senator so nominated shall become vacant, the Governor-General in Council shall nominate another person to be a senator, who shall hold his seat for ten years:

(iii) After the passing of this Act, and before the day appointed for the establishment of the Union, the Governor of each of the Colonies shall summon a special sitting of both Houses of the Legislature, and the two Houses sitting together as one body and presided over by the Speaker of the Legislative Assembly shall elect eight persons to be senators for the province. Such senators shall hold their seats for ten years. If the seat of a senator so elected shall become vacant, the provincial council of the province for which such senator has been elected shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat.

[1] This arrangement was a compromise between the advocates of Cape Town and of Pretoria as the capital of the new Union.

Subsequent constitution of Senate.

25. Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years,[1] and unless and until such provision shall have been made—

(i) the provisions of the last preceding section with regard to nominated senators shall continue to have effect;

(ii) eight senators for each province shall be elected by the members of the provincial council of such province together with the members of the House of Assembly elected for such province.[2] Such senators shall hold their seats for ten years unless the Senate be sooner dissolved. If the seat of an elected senator shall become vacant, the members of the provincial council of the province, together with the members of the House of Assembly elected for such province, shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat. The Governor-General in Council shall make regulations for the joint election of senators prescribed in this section.

Qualifications of senators.

26. The qualifications of a senator shall be as follows:—

He must—

(*a*) be not less than thirty years of age;[3]

(*b*) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces:

(*c*) have resided for five years within the limits of the Union as existing at the time when he is elected or nominated, as the case may be:

[1] Note that under this section Parliament has a free hand with regard to the constitution of the Senate after the expiration of the ten years.

[2] The method of election is an adaptation of the system of the single transferable vote, advocated by the English Proportional Representation Society. (See Brand, *op. cit.*, p. 65.

[3] With regard to these qualifications the South African Union followed generally the Cape Colony precedent. They are similar to those in the British North America Act.

(*d*) be a British subject of European descent ;

(*e*) in the case of an elected senator, be the registered owner of immovable property within the Union of the value of not less than five hundred pounds over and above any special mortgages thereon.

For the purposes of this section, residence in, and property situated within, a colony before its incorporation in the Union shall be treated as residence in and property situated within the Union.

Appointment and tenure of office of President.

27. The Senate shall, before proceeding to the dispatch of any other business, choose a senator to be the President of the Senate, and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President. The President shall cease to hold office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office by writing under his hand addressed to the Governor-General.

Deputy President.

28. Prior to or during any absence of the President the Senate may choose a senator to perform his duties in his absence.

Resignation of senators.

29. A senator may, by writing under his hand addressed to the Governor-General, resign his seat, which thereupon shall become vacant. The Governor-General shall as soon as practicable cause steps to be taken to have the vacancy filled.

Quorum.

30. The presence of at least twelve senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in the Senate.

31. All questions in the Senate shall be determined by a majority of votes of senators present other than the President or the presiding senator, who shall, however, have and exercise a casting vote in the case of an equality of votes.[1]

[1] It will be seen that in the Constitution of the Senate the South African Constitution follows to some extent American and to a less degree Canadian precedents. The South African Senate will neither represent the federal principle, nor be, like the Australian, a militant democratic body, that its secondary position to the Assembly is inevitable.

House of Assembly.

Constitution of House of Assembly.

32. The House of Assembly shall be composed of members directly chosen by the voters of the Union in electoral divisions delimited as hereinafter provided.

Original number of members.

33. The number of members to be elected in the Original Provinces at the first election and until the number is altered in accordance with the provisions of this Act shall be as follows:—

Cape of Good Hope . .	Fifty-one.
Natal	Seventeen.[1]
Transvaal	Thirty-six.
Orange Free State . .	Seventeen.[1]

These numbers may be increased as provided in the next succeeding section, but shall not, in the case of any Original Province, be diminished until the total number of members of the House of Assembly in respect of the provinces herein provided for reaches one hundred and fifty, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period.

Increase of number of members.

34. The number of members to be elected in each province, as provided in section thirty-three, shall be increased from time to time as may be necessary in accordance with the following provisions:—

(i) The quota of the Union shall be obtained by dividing the total number of European male adults in the Union, as ascertained at the census of nineteen hundred and four, by the total number of members of the House of Assembly as constituted at the establishment of the Union:

In nineteen hundred and eleven, and every five years thereafter, a census of the European population of the Union shall be taken for the purposes of this Act:

[1] Note that the Orange Free State and Natal have more than their proportional representation, and that for a time the system of representation suggests the continued existence of the separate colonies abolished by the Union; but this is not intended to be permanent. (See subsec. v of Sec. 34.)

(iii) After any such census the number of European male adults in each province shall be compared with the number of European male adults as ascertained at the census of nineteen hundred and four, and, in the case of any province where an increase is shown, as compared with the census of nineteen hundred and four, equal to the quota of the Union or any multiple thereof, the number of members allotted to such province in the last preceding section shall be increased by an additional member or an additional number of members equal to such multiple, as the case may be :

(iv) Notwithstanding anything herein contained, no additional member shall be allotted to any province until the total number of European male adults in such province exceeds the quota of the Union multiplied by the number of members allotted to such province for the time being, and thereupon additional members shall be allotted to such province in respect only of such excess :

(v) As soon as the number of members of the House of Assembly to be elected in the Original Provinces in accordance with the preceding subsections reaches the total of one hundred and fifty, such total shall not be further increased unless and until Parliament otherwise provides ; and subject to the provisions of the last preceding section the distribution of members among the provinces shall be such that the proportion between the number of members to be elected at any time in each province and the number of European male adults in such province, as ascertained at the last preceding census, shall as far as possible be identical throughout the Union :

(vi) "Male adults" in this Act shall be taken to mean males of twenty-one years of age or upwards not being members of His Majesty's regular forces on full pay :

(vii) For the purposes of this Act the number of European male adults, as ascertained at the census of nineteen hundred and four, shall be taken to be—

For the Cape of Good Hope . .	167,546
For Natal	34,784
For the Transvaal	106,493
For the Orange Free State . .	41,014

Qualifications of voters.

35.—(1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses.[1] A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

[1] Few questions presented greater difficulties than the question of the native vote. In the Transvaal and the Orange River Colony the franchise could only be exercised by white men, and in Natal, though natives could get on the register, there were such impediments in the way that in fact they hardly ever voted. In Cape Colony, on the other hand, under an educational qualification, considerable numbers of natives exercised the vote. Neither the Transvaal nor the Orange Free State, nor Natal, would have been willing to enfranchise the natives, more especially as in the two former manhood suffrage among the whites prevailed. Cape Colony was determined not to take the retrograde step of disfranchising the natives, and such action would have excited deep distrust and indignation in England. In this state of things the only course was to let each province pursue its own method; and while giving the Union Parliament power over the future, to safeguard the Cape Colony position by requiring a two-thirds majority at a joint sitting of both Houses. Moreover, any Bill altering the position is required by the Royal Instruction to be reserved, and such reservation would in this subject be no mere formality. It may be added that the only respect in which the native position is made worse by the Act is that they may not sit in the Union Parliament, whereas they were eligible, though never in fact elected, to that of Cape Colony.

(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

Application of existing qualifications.

36. Subject to the provisions of the last preceding section, the qualifications of parliamentary voters, as existing in the several Colonies at the establishment of the Union, shall be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the House of Assembly: Provided that no member of His Majesty's regular forces on full pay shall be entitled to be registered as a voter.

Elections.

37.—(1) Subject to the provisions of this Act, the laws in force in the Colonies at the establishment of the Union relating to elections for the more numerous Houses of Parliament in such Colonies respectively, the registration of voters, the oaths or declarations to be taken by voters, returning officers, the powers and duties of such officers, the proceedings in connection with elections, election expenses, corrupt and illegal practices, the hearing of election petitions and the proceedings incident thereto, the vacating of seats of members, and the proceedings necessary for filling such vacancies, shall, mutatis mutandis, apply to the elections in the respective provinces of members of the House of Assembly.

(2) Notwithstanding anything to the contrary in any of the said laws contained, at any general election of members of the House of Assembly, all polls shall be taken on one and the same day in all the electoral divisions throughout the Union, such day to be appointed by the Governor-General in Council.

Commission for delimitation of electoral divisions.

38. Between the date of the passing of this Act and the date fixed for the establishment of the Union, the Governor in Council of each of the Colonies shall nominate a judge of any of the Supreme or High Courts of the

Colonies, and the judges so nominated shall, upon acceptance by them respectively of such nomination, form a joint commission,[1] without any further appointment, for the purpose of the first division of the provinces into electoral divisions. The High Commissioner for South Africa shall forthwith convene a meeting of such commission at such time and place in one of the Colonies as he shall fix and determine. At such meeting the Commissioners shall elect one of their number as chairman of such commission. They shall thereupon proceed with the discharge of their duties under this Act, and may appoint persons in any province to assist them or to act as assessors to the commission or with individual members thereof for the purpose of inquiring into matters connected with the duties of the commission. The commission may regulate their own procedure and may act by a majority of their number. All moneys required for the payment of the expenses of such commission before the establishment of the Union in any of the Colonies shall be provided by the Governor in Council of such colony. In case of the death, resignation, or other disability of any of the Commissioners before the establishment of the Union, the Governor in Council of the Colony in respect of which he was nominated shall forthwith nominate another judge to fill the vacancy. After the establishment of the Union the expenses of the commission shall be defrayed by the Governor-General in Council, and any vacancies shall be filled by him.

Electoral divisions.

39. The commission shall divide each province into electoral divisions, each returning one member.

Method of dividing provinces into electoral divisions.

40.—(1) For the purpose of such division as is in the last preceding section mentioned, the quota of each province shall be obtained by dividing the total number of voters in the province, as ascertained at the last registra-

[1] The commission appointed under this section signed its report on May 10, 1910.

tion of voters, by the number of members of the House of Assembly to be elected therein.[1]

(2) Each province shall be divided into electoral divisions in such a manner that each such division shall, subject to the provisions of subsection (3) of this section, contain a number of voters, as nearly as may be, equal to the quota of the province.

(3) The Commissioners shall give due consideration[2] to—

(*a*) community or diversity of interests;[3]

(*b*) means of communication;

(*c*) physical features;

(*d*) existing electoral boundaries;

(*e*) sparsity or density of population;[4]

in such manner that, while taking the quota of voters as the basis of division, the Commissioners may, whenever they deem it necessary, depart therefrom, but in no case to any greater extent than fifteen per centum more or fifteen per centum less than the quota.[5]

[1] The following were the results obtained :—

	Quota.	Maximum.	Minimum.
Cape Colony	2,791	3,210	2,372
Transvaal	2,715	3,122	2,308
Natal	1,647	1,894	1,400
Orange Free State . . .	2,131	2,451	1,811

[2] Clauses (*a*) to (*d*) correspond substantially with the Instructions on the same subject to the Transvaal Delimitation Commissioners in 1906.

[3] 'With regard to the consideration of community or diversity of interest, it seemed impossible to lay down any comprehensive rule or principle.' It was impossible to group small towns in such a way as to involve 'alteration in the existing electoral boundaries'. There thus remain hard cases, for which, 'under the method of single-member constituencies, and in the absence of some system of proportional representation, it was not within the province of the Commission to suggest a remedy.'

[4] This means 'electoral population'; but the Commissioners held it a question of some doubt. 'It was found practically impossible to arrive at any precise definition of sparsity or density . . . On the whole, however, without framing any formula, there was no great difficulty in practice in deciding in which category each division, regarded as a unit, should be placed.'

[5] These provisions, inserted in the interests of the scattered Boer farmers, represented a compromise between the one vote one value principle in its extreme form and the method of assigning greater representation to

Alteration of electoral divisions.

41. As soon as may be after every quinquennial census, the Governor-General in Council shall appoint a commission consisting of three judges of the Supreme Court of South Africa to carry out any re-division which may have become necessary as between the different electoral divisions in each province, and to provide for the allocation of the number of members to which such province may have become entitled under the provisions of this Act. In carrying out such re-division and allocation the commission shall have the same powers and proceed upon the same principles as are by this Act provided in regard to the original division.

Powers and duties of commission for delimiting electoral divisions.

42.—(1) The joint commission constituted under section thirty-eight, and any subsequent commission appointed under the provisions of the last preceding section, shall submit to the Governor-General in Council—

(*a*) a list of electoral divisions, with the names given to them by the commission and a description of the boundaries of every such division:

(*b*) a map or maps showing the electoral divisions into which the provinces have been divided:

(*c*) such further particulars as they consider necessary.

(2) The Governor-General in Council may refer to the commission for its consideration any matter relating to such list or arising out of the powers or duties of the commission.

(3) The Governor-General in Council shall proclaim the names and boundaries of the electoral divisions as finally settled and certified by the commission, or a majority thereof, and thereafter, until there shall be a re-division,

country than to town districts in force in Cape Colony. The members of the Convention generally supported the former principle but allowed this invasion of it. It was very difficult to obtain the consent of the Cape Parliament to the principle of one vote one value, even as thus modified: and such consent was only obtained by jettisoning the provisions with regard to employing the system of proportional representation for the election of members of the House of Assembly, which were in the original Bill.

the electoral divisions as named and defined shall be the electoral divisions of the Union in the provinces.

(4) If any discrepancy shall arise between the description of the divisions and the aforesaid map or maps, the description shall prevail.

Date from which alteration of electoral divisions to take effect.

43. Any alteration in the number of members of the House of Assembly to be elected in the several provinces, and any re-division of the provinces into electoral divisions, shall, in respect of the election of members of the House of Assembly, come into operation at the next general election held after the completion of the re-division or of any allocation consequent upon such alteration, and not earlier.

Qualifications of members of House of Assembly.

44. The qualifications of a member of the House of Assembly shall be as follows:—

He must—

(*a*) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces;

(*b*) have resided for five years within the limits of the Union as existing at the time when he is elected;

(*c*) be a British subject of European descent.[1]

For the purposes of this section, residence in a colony before its incorporation in the Union shall be treated as residence in the Union.

Duration.

45. Every House of Assembly shall continue for five years from the first meeting thereof, and no longer, but may be sooner dissolved by the Governor-General.

Appointment and tenure of office of Speaker.

46. The House of Assembly shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and, as often as the office of Speaker becomes vacant, the House shall again choose a member to be the Speaker. The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign

[1] In Cape Colony natives had been eligible for election to Parliament, though in fact no native had been elected.

his office or his seat by writing under his hand addressed to the Governor-General.

Deputy Speaker.

47. Prior to or during the absence of the Speaker, the House of Assembly may choose a member to perform his duties in his absence.

Resignation of members.

48. A member may, by writing under his hand addressed to the Speaker, or, if there is no Speaker, or if the Speaker is absent from the Union, to the Governor-General, resign his seat, which shall thereupon become vacant.

Quorum.

49. The presence of at least thirty members of the House of Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Assembly.

50. All questions in the House of Assembly shall be determined by a majority of votes of members present other than the Speaker or the presiding member, who shall, however, have and exercise a casting vote in the case of an equality of votes.

Both Houses of Parliament.

Oath or affirmation of allegiance.

51. Every senator and every member of the House of Assembly shall, before taking his seat, make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the following form:—

Oath.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being*] His [*or Her*] heirs and successors according to law. So help me God.

Affirmation.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland*

for the time being] His [*or Her*] heirs and successors according to law.

Member of either House disqualified for being member of the other House.

52. A member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House: Provided that every minister of State who is a member of either House of Parliament shall have the right to sit and speak in the Senate and the House of Assembly, but shall vote only in the House of which he is a member.

Disqualifications for being a member of either House.

53. No person shall be capable of being chosen or of sitting as a senator or as a member of the House of Assembly who—

(*a*) has been at any time convicted of any crime or offence for which he shall have been sentenced to imprisonment without the option of a fine for a term of not less than twelve months, unless he shall have received a grant of amnesty or a free pardon, or unless such imprisonment shall have expired at least five years before the date of his election; or

(*b*) is an unrehabilitated insolvent; or

(*c*) is of unsound mind, and has been so declared by a competent court; or

(*d*) holds any office of profit under the Crown within the Union: Provided that the following persons shall not be deemed to hold an office of profit under the Crown for the purposes of this subsection:

(1) a minister of State for the Union;

(2) a person in receipt of a pension from the Crown;

(3) an officer or member of His Majesty's naval or military forces on retired or half pay, or an officer or member of the naval or military forces of the Union whose services are not wholly employed by the Union.

Vacation of seats.

54. If a senator, or member of the House of Assembly—

(*a*) becomes subject to any of the disabilities mentioned in the last preceding section; or

(*b*) ceases to be qualified as required by law: or

(*c*) fails for a whole ordinary session to attend without the special leave of the Senate or the House of Assembly, as the case may be;

his seat shall thereupon become vacant.

Penalty for sitting or voting when disqualified.

55. If any person who is by law incapable of sitting as a senator or member of the House of Assembly shall, while so disqualified and knowing or having reasonable grounds for knowing that he is so disqualified, sit or vote as a member of the Senate or House of Assembly, he shall be liable to a penalty of one hundred pounds for each day on which he shall so sit or vote, to be recovered on behalf of the Treasury of the Union by action in any Superior Court of the Union.

Allowances of members.

56. Each senator and each member of the House of Assembly shall, under such rules as shall be framed by Parliament, receive an allowance of four hundred pounds a year, to be reckoned from the date on which he takes his seat: Provided that for every day of the session on which he is absent there shall be deducted from such allowance the sum of three pounds: Provided further that no such allowance shall be paid to a Minister receiving a salary under the Crown or to the President of the Senate or the Speaker of the House of Assembly. A day of the session shall mean in respect of a member any day during a session on which the House of which he is a member or any committee of which he is a member meets.

Privileges of Houses of Parliament.

57. The powers, privileges, and immunities of the Senate and of the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament,[1] and until declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union.

Rules of procedure.

58. Each House of Parliament may make rules and orders with respect to the order and conduct of its business and proceedings. Until such rules and orders shall have

[1] Compare provisions of Canadian and Australian Statutes.

been made, the rules and orders of the Legislative Council and House of Assembly of the Cape of Good Hope at the establishment of the Union shall mutatis mutandis apply to the Senate and House of Assembly respectively. If a joint sitting of both Houses of Parliament is requ'ed under the provisions of this Act, it shall be convened by the Governor-General by message to both Houses. At any such joint sitting the Speaker of the House of Assembly shall preside and the rules of the House of Assembly shall, as far as practicable, apply.

Powers of Parliament.

Powers of Parliament.

59. Parliament shall have full power to make laws for the peace, order, and good government of the Union.

Money Bills.

60.—(1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(2) The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.[1]

(3) The Senate may not amend any Bill so as to increase any proposed charges or burden on the people.

Appropriation Bills.

61. Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Recommendation of money votes.

62. The House of Assembly shall not originate or pass any vote, resolution, address, or Bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose unless such appropriation has been recommended by message from the Governor-General during the Session in which such vote, resolution, address, or Bill is proposed.

[1] These words were inserted to meet a difficulty which had arisen in the Transvaal in 1909.

Disagreements between the two Houses.

63. If the House of Assembly passes any Bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament and not agreed to by the other; and any such amendments which are affirmed by a majority of the total number of members of the Senate and House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament: Provided that, if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill.[1]

[1] Compare Australian provisions with regard to deadlocks. In South Africa there is no need for a dissolution of Parliament before the joint sitting; and the size of the Senate is not more than one-third, instead of one-half, of the House of Assembly; a point which may be of importance in case of a joint sitting. As the Bill was first drafted, if the Assembly passed a Bill and the Senate rejected it, the Governor-General might forthwith convene a joint sitting. It was subsequently agreed that the Bill must be rejected in successive sessions before the joint sitting could be enforced. The Union provisions were based on those in force in the Transvaal, which in turn were a more democratic adaptation of those of the Commonwealth Act.

Royal Assent to Bills.

64. When a Bill is presented to the Governor-General for the King's assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent, or that he reserves the Bill for the signification of the King's pleasure. All Bills repealing or amending this section or any of the provisions of Chapter IV. under the heading "House of Assembly", and all Bills abolishing provincial councils or abridging the powers conferred on provincial councils under section eighty-five, otherwise than in accordance with the provisions of that section, shall be so reserved. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation.

Disallowance of Bills.

65. The King may disallow any law within one year after it has been assented to by the Governor-General, and such disallowance, on being made known by the Governor-General by speech or message to each of the Houses of Parliament or by proclamation, shall annul the law from the day when the disallowance is so made known.

Reservation of Bills.

66. A Bill reserved for the King's pleasure shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General for the King's assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by proclamation that it has received the King's assent.

Signature and enrolment of Acts.

67. As soon as may be after any law shall have been assented to in the King's name by the Governor-General, or having been reserved for the King's pleasure shall have received his assent, the Clerk of the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be

enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies thus deposited that signed by the Governor-General shall prevail.

V.—The Provinces.[1]

Administrators.

Appointment and tenure of office of provincial administrators.

68.—(1) In each province there shall be a chief executive officer appointed by the Governor-General in Council, who shall be styled the administrator of the province, and in whose name all executive acts relating to provincial affairs thereinshall be done.

(2) In the appointment of the administrator of any province, the Governor-General in Council shall, as far as practicable, give preference to persons resident in such province.

(3) Such administrator shall hold office for a term of five years and shall not be removed before the expiration thereof except by the Governor-General in Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session.

(4) The Governor-General in Council may from time to time appoint a deputy administrator to execute the office and functions of the administrator during his absence, illness, or other inability.

[1] See the interesting chapter by Mr. Brand on 'Provincial Constitutions', *op. cit.*, pp. 75-88. It is impossible at present to say how the system will work. It may possibly prove not unlike the system in work in English county or borough councils; where parties exist, and the work is carried on by committees, consisting of members of both parties.

69. The salaries of the administrators shall be fixed and provided by Parliament, and shall not be reduced during their respective terms of office. Salaries of administrators.

Provincial Councils.

70.—(1) There shall be a provincial council in each province consisting of the same number of members as are elected in the province for the House of Assembly: Provided that, in any province whose representatives in the House of Assembly shall be less than twenty-five in number, the provincial council shall consist of twenty-five members. Constitution of provincial councils.

(2) Any person qualified to vote for the election of members of the provincial council shall be qualified to be a member of such council.

71.—(1) The members of the provincial council shall be elected by the persons qualified to vote for the election of members of the House of Assembly in the province voting in the same electoral divisions as are delimited for the election of members of the House of Assembly: Provided that, in any province in which less than twenty-five members are elected to the House of Assembly, the delimitation of the electoral divisions, and any necessary re-allocation of members or adjustment of electoral divisions, shall be effected by the same commission and on the same principles as are prescribed in regard to the electoral divisions for the House of Assembly. Qualification of provincial councillors.

(2) Any alteration in the number of members of the provincial council, and any re-division of the province into electoral divisions, shall come into operation at the next general election for such council held after the completion of such re-division, or of any allocation consequent upon such alteration, and not earlier.

(3) The election shall take place at such times as the administrator shall by proclamation direct, and the provisions of section thirty-seven applicable to the election of members

of the House of Assembly shall mutatis mutandis apply to such election.

Application of sections 53 to 55 to provincial councillors.

72. The provisions of section fifty-three, fifty-four, and fifty-five, relative to members of the House of Assembly shall mutatis mutandis apply to members of the provincial councils: Provided that any member of a provincial council who shall become a member of either House of Parliament shall thereupon cease to be a member of such provincial council.

Tenure of office by provincial councillors.

73. Each provincial council shall continue for three years from the date of its first meeting, and shall not be subject to dissolution save by effluxion of time.

Sessions of provincial councils.

74. The administrator of each province shall by proclamation fix such times for holding the sessions of the provincial council as he may think fit, and may from time to time prorogue such council: Provided that there shall be a session of every provincial council once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the council in one session and its first sitting in the next session.

Chairmen of provincial councils.

75. The provincial council shall elect from among its members a chairman, and may make rules for the conduct of its proceedings. Such rules shall be transmitted by the administrator to the Governor-General, and shall have full force and effect unless and until the Governor-General in Council shall express his disapproval thereof in writing addressed to the administrator.

Allowances of provincial councillors.

76. The members of the provincial council shall receive such allowances as shall be determined by the Governor-General in Council.

Freedom of speech in provincial councils.

77. There shall be freedom of speech in the provincial council, and no member shall be liable to any action or proceeding in any court by reason of his speech or vote in such council.

Executive Committees.

Provincial exe-

78.—(1) Each provincial council shall at its first meeting

after any general election elect from among its members, or otherwise, four persons to form with the administrator, who shall be chairman, an executive committee for the province. The members of the executive committee other than the administrator shall hold office until the election of their successors in the same manner. cutive committees.

(2) Such members shall receive such remuneration as the provincial council, with the approval of the Governor-General in Council, shall determine.

(3) A member of the provincial council shall not be disqualified from sitting as a member by reason of his having been elected as a member of the executive committee.

(4) Any casual vacancy arising in the executive committee shall be filled by election by the provincial council if then in session or, if the council is not in session, by a person appointed by the executive committee to hold office temporarily pending an election by the council.

79. The administrator and any other member of the executive committee of a province, not being a member of the provincial council, shall have the right to take part in the proceedings of the council, but shall not have the right to vote. Right of administrator, &c. to take part in proceedings of provincial council.

80. The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs. Until the first election of members to serve on the executive committee, such administration shall be carried on by the administrator. Whenever there are not sufficient members of the executive committee to form a quorum according to the rules of the committee, the administrator shall, as soon as practicable, convene a meeting of the provincial council for the purpose of electing members to fill the vacancies, and until such election the administrator shall carry on the administration of provincial affairs. Powers of provincial executive committees.

81. Subject to the provisions of this Act, all powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in or exercised Transfer of powers to provincial

Executive committees.

by the Governor or the Governor in Council, or any minister of the Colony shall after such establishment be vested in the executive committee of the province so far as such powers, authorities, and functions relate to matters in respect of which the provincial council is competent to make ordinances.

Voting in executive committees.

82. Questions arising in the executive committee shall be determined by a majority of votes of the members present, and, in case of an equality of votes, the administrator shall have also a casting vote. Subject to the approval of the Governor-General in Council, the executive committee may make rules for the conduct of its proceedings.

Tenure of office by members of executive committees.

83. Subject to the provisions of any law passed by Parliament regulating the conditions of appointment, tenure of office, retirement and superannuation of public officers, the executive committee shall have power to appoint such officers as may be necessary, in addition to officers assigned to the province by the Governor-General in Council under the provisions of this Act, to carry out the services entrusted to them and to make and enforce regulations for the organisation and discipline of such officers.

Power of administrator to act on behalf of Governor-General in Council.

84. In regard to all matters in respect of which no powers are reserved or delegated to the provincial council, the administrator shall act on behalf of the Governor-General in Council when required to do so, and in such matters the administrator may act without reference to the other members of the executive committee.

Powers of Provincial Councils.

Powers of provincial councils.

85. Subject to the provisions of this Act and the assent of the Governor-General in Council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects (that is to say):—

(i) Direct taxation within the province in order to raise a revenue for provincial purposes:

(ii) The borrowing of money on the sole credit of the province with the consent of the Governor-General in Council and in accordance with regulations to be framed by Parliament:

(iii) Education,[1] other than higher education, for a period of five years and thereafter until Parliament otherwise provides:

(iv) Agriculture to the extent and subject to the conditions to be defined by Parliament:

(v) The establishment, maintenance, and management of hospitals and charitable institutions:

(vi) Municipal institutions, divisional councils, and other local institutions of a similar nature:

(vii) Local works and undertakings within the province, other than railways and harbours and other than such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise:

(viii) Roads, outspans, ponts, and bridges, other than bridges connecting two provinces:

(ix) Markets and pounds:

(x) Fish and game preservation:

(xi) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section:

(xii) Generally all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province:[2]

[1] See Introduction, p. 88. This provision was inserted to placate the Orange River Colony, but from the point of view of promoting the union of races it is certainly unfortunate.

[2] See on this extraordinary provision, Introduction, p. 88.

(xiii) All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council.

Effect of provincial ordinances.

86. Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament.

Recommendations to Parliament.

87. A provincial council may recommend to Parliament the passing of any law relating to any matter in respect of which such council is not competent to make ordinances.

Power to deal with matters proper to be dealt with by private Bill legislation.

88. In regard to any matter which requires to be dealt with by means of a private Act of Parliament, the provincial council of the province to which the matter relates may, subject to such procedure as shall be laid down by Parliament, take evidence by means of a Select Committee or otherwise for and against the passing of such law, and, upon receipt of a report from such council, together with the evidence upon which it is founded, Parliament may pass such Act without further evidence being taken in support thereof.

Constitution of provincial revenue fund.

89. A provincial revenue fund shall be formed in every province, into which shall be paid all revenues raised by or accruing to the provincial council and all moneys paid over by the Governor-General in Council to the provincial council. Such fund shall be appropriated by the provincial council by ordinance for the purposes of the provincial administration generally, or, in the case of moneys paid over by the Governor-General in Council for particular purposes, then for such purposes, but no such ordinance shall be passed by the provincial council unless the administrator shall have first recommended to the council to make provision for the specific service for which the appropriation is to be made. No money shall be issued from the provincial revenue fund except in accordance with such appropriation and under warrant signed by the administrator: Provided that, until the expiration of one month after the first meeting of the provincial council, the administrator may expend

such moneys as may be necessary for the services of the province.

Assent to provincial ordinances.

90. When a proposed ordinance has been passed by a provincial council it shall be presented by the administrator to the Governor-General in Council for his assent. The Governor-General in Council shall declare within one month from the presentation to him of the proposed ordinance that he assents thereto, or that he withholds assent, or that he reserves the proposed ordinance for further consideration. A proposed ordinance so reserved shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General in Council, he makes known by proclamation that it has received his assent.

Effect and enrolment of ordinances.

91. An ordinance assented to by the Governor-General in Council and promulgated by the administrator shall, subject to the provisions of this Act, have the force of law within the province. The administrator shall cause two fair copies of every such ordinance, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the provisions of such ordinance, and, in case of conflict between the two copies thus deposited, that signed by the Governor-General shall prevail.

Miscellaneous.

Audit of provincial accounts.

92.—(1) In each province there shall be an auditor of accounts to be appointed by the Governor-General in Council.

(2) No such auditor shall be removed from office except by the Governor-General in Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parlia

ment be then sitting, and, if Parliament be not sitting, then within one week after the commencement of the next ensuing session.

(3) Each such auditor shall receive out of the Consolidated Revenue Fund such salary as the Governor-General in Council, with the approval of Parliament, shall determine.

(4) Each such auditor shall examine and audit the accounts of the province to which he is assigned subject to such regulations and orders as may be framed by the Governor-General in Council and approved by Parliament, and no warrant signed by the administrator authorising the issuing of money shall have effect unless countersigned by such auditor.

Continuation of powers of divisional and municipal councils.

93. Notwithstanding anything in this Act contained, all powers, authorities, and functions lawfully exercised at the establishment of the Union by divisional or municipal councils, or any other duly constituted local authority, shall be and remain in force until varied or withdrawn by Parliament or by provincial council having power in that behalf.

Seats of provincial government.

94. The seats of provincial government shall be—

For the Cape of Good Hope .	Cape Town.
For Natal	Pietermaritzburg.
For the Transvaal . . .	Pretoria.
For the Orange Free State .	Bloemfontein.

VI.—The Supreme Court of South Africa.[1]

Constitution of Supreme Court.

95. There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the ordinary

[1] The Government being a union and not a federation, and the powers of Parliament, within certain limitations, being absolute, the Supreme Court will not play the leading part that it does in the great federations; but there will be considerable convenience in the abolition of four independent Supreme Courts, none of which was bound by the decisions of the other.

judges of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces.

Appellate Division of Supreme Court.

96. There shall be an Appellate Division of the Supreme Court of South Africa, consisting of the Chief Justice of South Africa, two ordinary judges of appeal, and two additional judges of appeal. Such additional judges of appeal shall be assigned by the Governor-General in Council to the Appellate Division from any of the provincial or local divisions of the Supreme Court of South Africa, but shall continue to perform their duties as judges of their respective divisions when their attendance is not required in the Appellate Division.

Filling of temporary vacancies in Appellate Division.

97. The Governor-General in Council may, during the absence, illness, or other incapacity of the Chief Justice of South Africa, or of any ordinary or additional judge of appeal, appoint any other judge of the Supreme Court of South Africa to act temporarily as such chief justice, ordinary judge of appeal, or additional judge of appeal, as the case may be.

Constitution of provincial and local divisions of Supreme Court.

98.—(1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president.

(2) The court of the eastern districts of the Cape of Good Hope, the High Court of Griqualand, the High Court of Witwatersrand, and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union.

(3) The said provincial and local divisions, referred to in this Act as superior courts, shall, in addition to any original jurisdiction exercised by the corresponding courts of the

Colonies at the establishment of the Union, have jurisdiction in all matters—

(*a*) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party:

(*b*) in which the validity of any provincial ordinance shall come into question.

(4) Unless and until Parliament shall otherwise provide, the said superior courts shall mutatis mutandis have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to parliamentary elections in such Colonies respectively.

Continuation in office of existing judges.

99. All judges of the supreme courts of the Colonies, including the High Court of the Orange River Colony, holding office at the establishment of the Union shall on such establishment become judges of the Supreme Court of South Africa, assigned to the divisions of the Supreme Court in the respective provinces, and shall retain all such rights in regard to salaries and pensions as they may possess at the establishment of the Union. The Chief Justices of the Colonies holding office at the establishment of the Union shall on such establishment become the Judges-President of the divisions of the Supreme Court in the respective provinces, but shall so long as they hold that office retain the title of Chief Justice of their respective provinces.

Appointment and remuneration of judges.

100. The Chief Justice of South Africa, the ordinary judges of appeal, and all other judges of the Supreme Court of South Africa to be appointed after the establishment of the Union shall be appointed by the Governor-General in Council, and shall receive such remuneration as Parliament shall prescribe, and their remuneration shall not be diminished during their continuance in office.

Tenure of office by judges.

101. The Chief Justice of South Africa and other judges of the Supreme Court of South Africa shall not be removed

from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.

Reduction in number of judges.

102. Upon any vacancy occurring in any division of the Supreme Court of South Africa, other than the Appellate Division, the Governor-General in Council may, in case he shall consider that the number of judges of such court may with advantage to the public interest be reduced, postpone filling the vacancy until Parliament shall have determined whether such reduction shall take place.

Appeals to Appellate Division.

103. In every civil case in which, according to the law in force at the establishment of the Union, an appeal might have been made to the Supreme Court of any of the Colonies from a Superior Court in any of the Colonies, or from the High Court of Southern Rhodesia, the appeal shall be made only to the Appellate Division, except in cases of orders or judgments given by a single judge, upon applications by way of motion or petition or on summons for provisional sentence or judgments as to costs only, which by law are left to the discretion of the court. The appeal from any such orders or judgments, as well as any appeal in criminal cases from any such Superior Court, or the special reference by any such court of any point of law in a criminal case, shall be made to the provincial division corresponding to the court which before the establishment of the Union would have had jurisdiction in the matter. There shall be no further appeal against any judgment given on appeal by such provincial division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal.

Existing appeals.

104. In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from the Supreme Court of any of the Colonies or from the High Court of the Orange River Colony to the King in Council, the appeal shall be made only to the Appellate

Division: Provided that the right of appeal in any civil suit shall not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in such suit.

Appeals from inferior courts to provincial divisions.

105. In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from a court of resident magistrate or other inferior court to a superior court in any of the Colonies, the appeal shall be made to the corresponding division of the Supreme Court of South Africa; but there shall be no further appeal against any judgment given on appeal by such division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal.

Provisions as to appeals to the King in Council.

106. There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council.[1] Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure: Provided that nothing in this section shall affect any right of appeal to His Majesty in Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890.

53 & 54 Vict. c. 27.

Rules of procedure in Appellate Division.

107. The Chief Justice of South Africa and the ordinary judges of appeal may, subject to the approval of the Governor-General in Council, make rules for the conduct of the proceedings of the Appellate Division and prescribing the time and manner of making appeals thereto. Until such rules shall have been promulgated, the rules in force in the Supreme Court of the Cape of Good Hope at the establishment of the Union shall mutatis mutandis apply.

[1] Compare language of Sec. 74 of Commonwealth Act.

108. The Chief Justice and other judges of the Supreme Court of South Africa may, subject to the approval of the Governor-General in Council, frame rules for the conduct of the proceedings of the several provincial and local divisions. Until such rules shall have been promulgated, the rules in force at the establishment of the Union in the respective courts which become divisions of the Supreme Court of South Africa shall continue to apply therein. Rules of procedure in provincial and local divisions.

109. The Appellate Division shall sit in Bloemfontein,[1] but may from time to time for the convenience of suitors hold its sittings at other places within the Union. Place of sittings of Appellate Division.

110. On the hearing of appeals from a court consisting of two or more judges, five judges of the Appellate Division shall form a quorum, but, on the hearing of appeals from a single judge, three judges of the Appellate Division shall form a quorum. No judge shall take part in the hearing of any appeal against the judgment given in a case heard before him. Quorum for hearing appeals.

111. The process of the Appellate Division shall run throughout the Union, and all its judgments or orders shall have full force and effect in every province, and shall be executed in like manner as if they were original judgments or orders of the provincial division of the Supreme Court of South Africa in such province. Jurisdiction of Appellate Division.

112. The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar. Execution of processes of provincial divisions.

113. Any provincial or local division of the Supreme Transfer of suits

[1] This provision was a sop to the Orange Free State.

from one provincial or local division to another.

Court of South Africa to which it may be made to appear that any civil suit pending therein may be more conveniently or fitly heard or determined in another division may order the same to be removed to such other division, and thereupon such last-mentioned division may proceed with such suit in like manner as if it had been originally commenced therein.

Registrar and officers of Appellate Division.

114. The Governor-General in Council may appoint a registrar of the Appellate Division and such other officers thereof as shall be required for the proper dispatch of the business thereof.

Advocates and attorneys.

115.—(1) The laws regulating the admission of advocates and attorneys to practise before any superior court of any of the Colonies shall mutatis mutandis apply to the admission of advocates and attorneys to practise in the corresponding division of the Supreme Court of South Africa.

(2) All advocates and attorneys entitled at the establishment of the Union to practise in any superior court of any of the Colonies shall be entitled to practise as such in the corresponding division of the Supreme Court of South Africa.

(3) All advocates and attorneys entitled to practise before any provincial division of the Supreme Court of South Africa shall be entitled to practise before the Appellate Division.

Pending suits.

116. All suits, civil or criminal, pending in any superior court of any of the Colonies at the establishment of the Union shall stand removed to the corresponding division of the Supreme Court of South Africa, which shall have jurisdiction to hear and determine the same, and all judgments and orders of any superior court of any of the Colonies given or made before the establishment of the Union shall have the same force and effect as if they had been given or made by the corresponding division of the Supreme Court of South Africa. All appeals to the King in Council which shall be pending at the establishment of

the Union shall be proceeded with as if this Act had not been passed.

VII.—Finance and Railways.[1]

Constitution of Consolidated Revenue Fund and Railway and Harbour Fund.

117. All revenues, from whatever source arising, over which the several Colonies have at the establishment of the Union power of appropriation, shall vest in the Governor-General in Council. There shall be formed a Railway and Harbour Fund, into which shall be paid all revenues raised or received by the Governor-General in Council from the administration of the railways, ports, and harbours, and such fund shall be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by this Act. There shall also be formed a Consolidated Revenue Fund, into which shall be paid all other revenues raised or received by the Governor-General in Council, and such fund shall be appropriated by Parliament for the purposes of the Union in the manner prescribed by this Act, and subject to the charges imposed thereby.

Commission of inquiry into financial relations between Union and provinces.

118. The Governor-General in Council shall, as soon as may be after the establishment of the Union, appoint a commission, consisting of one representative from each province, and presided over by an officer from the Imperial Service, to institute an inquiry into the financial relations which should exist between the Union and the provinces. Pending the completion of that inquiry and until Parliament otherwise provides, there shall be paid annually out of the Consolidated Revenue Fund to the administrator of each province—

(*a*) an amount equal to the sum provided in the estimates for education, other than higher education, in respect

[1] For a striking picture of the results of disunion on the railway development of South Africa see Part II of Lord Selborne's Memorandum on a Federation of the South African Colonies, 1907 [Cd. 3561], and the paper appended, at p. 65, on 'South African Railway Unification and its Effects on Railway Rates'.

of the financial year, 1908–9, as voted by the Legislature of the corresponding colony during the year nineteen hundred and eight;

(*b*) such further sums as the Governor-General in Council may consider necessary for the due performance of the services and duties assigned to the provinces respectively.

Until such inquiry shall be completed and Parliament shall have made other provision, the executive committees in the several provinces shall annually submit estimates of their expenditure for the approval of the Governor-General in Council, and no expenditure shall be incurred by any executive committee which is not provided for in such approved estimates.

Security for existing public debts.

119. The annual interest of the public debts of the Colonies and any sinking funds constituted by law at the establishment of the Union shall form a first charge on the Consolidated Revenue Fund.

Requirements for withdrawal of money from funds.

120. No money shall be withdrawn from the Consolidated Revenue Fund or the Railway and Harbour Fund except under appropriation made by law. But, until the expiration of two months after the first meeting of Parliament, the Governor-General in Council may draw therefrom and expend such moneys as may be necessary for the public service, and for railway and harbour administration respectively.

Transfer of Colonial property to the Union.

121. All stocks, cash, bankers' balances, and securities for money belonging to each of the Colonies at the establishment of the Union shall be the property of the Union: Provided that the balances of any funds raised at the establishment of the Union by law for any special purposes in any of the Colonies shall be deemed to have been appropriated by Parliament for the special purposes for which they have been provided.

Crown lands, &c.

122. Crown lands, public works, and all property throughout the Union, movable or immovable, and all rights of

whatever description belonging to the several Colonies at the establishment of the Union, shall vest in the Governor-General in Council subject to any debt or liability specifically charged thereon.

Mines and minerals.

123. All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of, minerals or precious stones, which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General in Council.

Assumption by Union of colonial debts.

124. The Union shall assume all debts and liabilities of the Colonies existing at its establishment, subject, notwithstanding any other provision contained in this Act, to the conditions imposed by any law under which such debts or liabilities were raised or incurred, and without prejudice to any rights of security or priority in respect of the payment of principal, interest, sinking fund, and other charges conferred on the creditors of any of the Colonies, and may, subject to such conditions and rights, convert, renew, or consolidate such debts.

Ports, harbours, and railways.

125. All ports, harbours, and railways belonging to the several Colonies at the establishment of the Union shall from the date thereof vest in the Governor-General in Council. No railway for the conveyance of public traffic, and no port, harbour, or similar work, shall be constructed without the sanction of Parliament.

Constitution of Harbour and Railway Board.

126. Subject to the authority of the Governor-General in Council, the control and management of the railways, ports, and harbours of the Union shall be exercised through a board consisting of not more than three commissioners, who shall be appointed by the Governor General in Council, and a minister of State, who shall be chairman. Each commissioner shall hold office for a period of five years, but may be re-appointed. He shall not be removed before the expiration of his period of appointment, except by the Governor-General in Council for cause assigned, which

shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their respective terms of office.

Administration of railways, ports, and harbours.

127. The railways, ports, and harbours of the Union shall be administered on business principles, due regard being had to agricultural and industrial development within the Union and promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union.[1] So far as may be, the total earnings shall be not more than are sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation, and the payment of interest due on capital not being capital contributed out of railway or harbour revenue, and not including any sums payable out of the Consolidated Revenue Fund in accordance with the provisions of sections one hundred and thirty and one hundred and thirty-one. The amount of interest due on such capital invested shall be paid over from the Railway and Harbour Fund into the Consolidated Revenue Fund. The Governor-General in Council shall give effect to the provisions of this section as soon as and at such time as the necessary administrative and financial arrangements can be made, but in any case shall give full effect to them before the expiration of four years from the establishment of the Union. During such period, if the revenues accruing to the Consolidated Revenue Fund are insufficient to provide for the general service of the Union, and if the earnings accruing to the Railway and Harbour Fund are in excess of the outlays specified herein, Parliament may by law appropriate such

[1] According to Mr. Brand, *op. cit.*, p. 96, General Smuts designated these clauses as the Magna Charta of the interior.

excess or any part thereof towards the general expenditure of the Union, and all sums so appropriated shall be paid over to the Consolidated Revenue Fund.

Establishment of fund for maintaining uniformity of railway rates.

128. Notwithstanding anything to the contrary in the last preceding section, the Board may establish a fund out of railway and harbour revenue to be used for maintaining, as far as may be, uniformity of rates notwithstanding fluctuations in traffic.

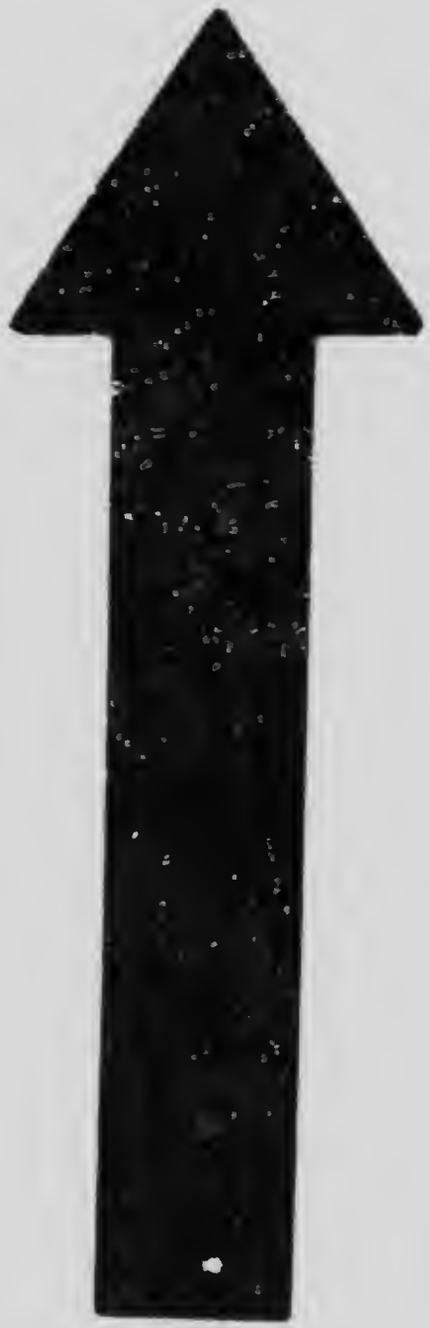
Management of railway and harbour balances.

129. All balances standing to the credit of any fund established in any of the Colonies for railway or harbour purposes at the establishment of the Union shall be under the sole control and management of the Board, and shall be deemed to have been appropriated by Parliament for the respective purposes for which they have been provided.

Construction of harbour and railway works.

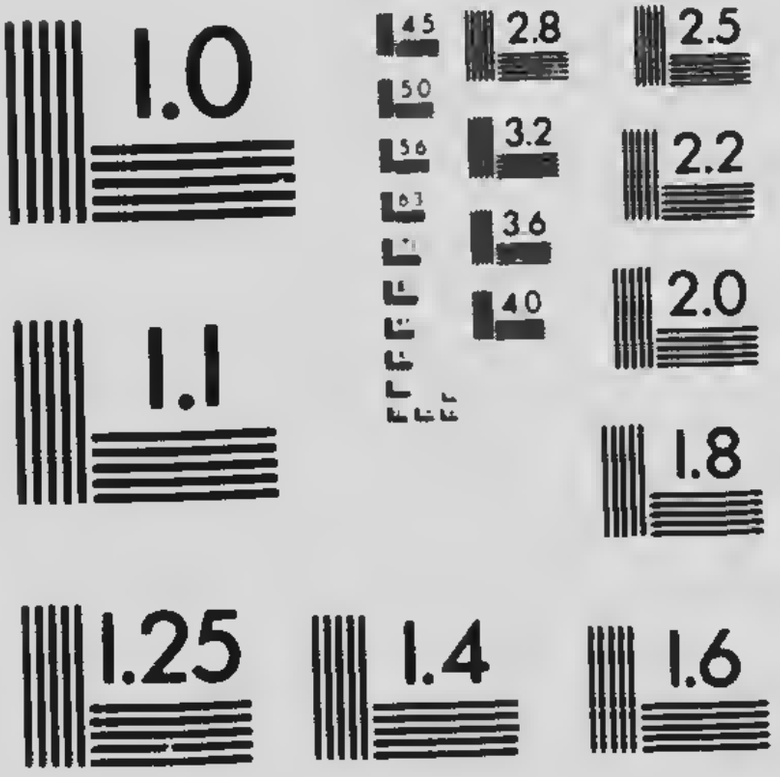
130. Every proposal for the construction of any port or harbour works or of any line of railway, before being submitted to Parliament, shall be considered by the Board, which shall report thereon, and shall advise whether the proposed works or line of railway should or should not be constructed. If any such works or line shall be constructed contrary to the advice of the Board, and if the Board is of opinion that the revenue derived from the operation of such works or line will be insufficient to meet the costs of working and maintenance, and of interest on the capital invested therein, it shall frame an estimate of the annual loss which, in its opinion, will result from such operation. Such estimate shall be examined by the Controller and Auditor-General, and when approved by him the amount thereof shall be paid over annually from the Consolidated Revenue Fund to the Railway and Harbour Fund:[1] Provided that, if in any year the actual loss incurred, as calculated by the Board and certified by the Controller and Auditor-General, is less than the estimate

[1] These elaborate provisions are to prevent political jobbery in the making of new railways. They were recommended in the Memorandum forwarded by Lord Selborne, of which mention has already been made. See note on p. 273.



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
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framed by the Board, the amount paid over in respect of that year shall be reduced accordingly so as not to exceed the actual loss incurred. In calculating the loss arising from the operation of any such work or line, the Board shall have regard to the value of any contributions of traffic to other parts of the system which may be due to the operation of such work or line.

Making good of deficiencies in Railway Fund in certain cases.

131. If the Board shall be required by the Governor-General in Council or under any Act of Parliament or resolution of both Houses of Parliament to provide any services or facilities either gratuitously or at a rate of charge which is insufficient to meet the costs involved in the provision of such services or facilities, the Board shall at the end of each financial year present to Parliament an account approved by the Controller and Auditor-General, showing, as nearly as can be ascertained, the amount of the loss incurred by reason of the provision of such services and facilities, and such amount shall be paid out of the Consolidated Revenue Fund to the Railway and Harbour Fund.[1]

Controller and Auditor-General.

132. The Governor-General in Council shall appoint a Controller and Auditor-General who shall hold office during good behaviour: provided that he shall be removed by the Governor-General in Council on an address praying for such removal presented to the Governor-General by both Houses of Parliament: provided further that when Parliament is not in session the Governor-General in Council may suspend such officer on the ground of incompetence or misbehaviour; and, when and so often as such suspension shall take place, a full statement of the circumstances shall be laid before both Houses of Parliament within fourteen days after the commencement of its next session; and, if an address shall at any time during the session of Parliament be presented to the Governor-General by both Houses praying for the restoration to office of such officer, he shall

[1] See note on p. 277.

be restored accordingly; and if no such address be presented the Governor-General shall confirm such suspension and shall declare the office of Controller and Auditor-General to be, and it shall thereupon become, vacant. Until Parliament shall otherwise provide, the Controller and Auditor-General shall exercise such powers and functions and undertake such duties as may be assigned to him by the Governor-General in Council by regulations framed in that behalf.

Compensation of colonial capitals for diminution of prosperity.

133. In order to compensate Pietermaritzburg and Bloemfontein for any loss sustained by them in the form of diminution of prosperity or decreased rateable value by reason of their ceasing to be the seats of government of their respective colonies, there shall be paid from the Consolidated Revenue Fund for a period not exceeding twenty-five years to the municipal councils of such towns a grant of two per centum per annum on their municipal debts, as existing on the thirty-first day of January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. The Commission appointed under section one hundred and eighteen shall, after due inquiry, report to the Governor-General in Council what compensation should be paid to the municipal councils of Cape Town and Pretoria for the losses, if any, similarly sustained by them. Such compensation shall be paid out of the Consolidated Revenue Fund for a period not exceeding twenty-five years, and shall not exceed one per centum per annum on the respective municipal debts of such towns as existing on the thirty-first January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. For the purposes of this section Cape Town shall be deemed to include the municipalities of Cape Town, Green Point, and Sea Point, Woodstock, Mowbray, and Rondebosch, Claremont, and Wynberg, and any grant made to Cape Town shall be payable to the councils of such municipalities in proportion to their respective debts. One half of any such

grants shall be applied to the redemption of the municipal debts of such towns respectively. At any time after the tenth annual grant has been paid to any of such towns the Governor-General in Council, with the approval of Parliament, may after due inquiry withdraw or reduce the grant to such town.

VIII.—General.

Method of voting for senators, &c.

134. The election of senators and of members of the executive committees of the provincial councils as provided in this Act shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote.[1] The Governor-General in Council, or, in the case of the first election of the Senate, the Governor in Council of each of the Colonies, shall frame regulations prescribing the method of voting and of transferring and counting votes and the duties of returning officers in connection therewith, and such regulations or any amendments thereof after being duly promulgated shall have full force and effect unless and until Parliament shall otherwise provide.

Continuation of existing colonial laws.

135. Subject to the provisions of this Act, all laws in force in the several Colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by Parliament, or by the provincial councils in matters in respect of which the power to make ordinances is reserved or delegated to them. All legal commissions in the several Colonies at the establishment of the Union shall continue as if the Union had not been established.

Free trade throughout Union.

136. There shall be free trade throughout the Union, but until Parliament otherwise provides the duties of custom and of excise leviable under the laws existing in any of the Colonies at the establishment of the Union shall remain in force.

[1] See p. 85 for attempt to introduce principle of proportional representation on a larger scale.

137. Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.[1] Equality of English and Dutch languages.

138. All persons who have been naturalised in any of the Colonies shall be deemed to be naturalised throughout the Union. Naturalisation.

139. The administration of justice throughout the Union shall be under the control of a minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies, save and except all powers, authorities, and functions relating to the prosecution of crimes and offences, which shall in each province be vested in an officer to be appointed by the Governor-General in Council, and styled the Attorney-General of the province, who shall also discharge such other duties as may be assigned to him by the Governor-General in Council: Provided that in the province of the Cape of Good Hope the Solicitor-General for the Eastern Districts and the Crown Prosecutor for Griqualand West shall respectively continue to exercise the powers and duties by law vested in them at the time of the establishment of the Union. Administration of justice.

140. Subject to the provisions of the next succeeding section, all officers of the public service of the Colonies shall at the establishment of the Union become officers of the Union. Existing officers.

141.—(1) As soon as possible after the establishment of the Union, the Governor-General in Council shall appoint a public service commission to make recommendations for Reorganisation of public departments.

[1] Nothing more facilitated the working of the convention than the readiness of the English delegates to give cordial assent to this provision. It cleared the air of much suspicion and distrust.

such reorganisation and readjustment of the departments of the public service as may be necessary. The commission shall also make recommendations in regard to the assignment of officers to the several provinces.

(2) The Governor-General in Council may after such commission has reported assign from time to time to each province such officers as may be necessary for the proper discharge of the services reserved or delegated to it, and such officers on being so assigned shall become officers of the province. Pending the assignment of such officers, the Governor-General in Council may place at the disposal of the provinces the services of such officers of the Union as may be necessary.

(3) The provisions of this section shall not apply to any service or department under the control of the Railway and Harbour Board, or to any person holding office under the Board.

Public service commission.

142. After the establishment of the Union the Governor-General in Council shall appoint a permanent public service commission with such powers and duties relating to the appointment, discipline, retirement, and superannuation of public officers as Parliament shall determine.[1]

Pensions of existing officers.

143. Any officer of the public service of any of the Colonies at the establishment of the Union who is not retained in the service of the Union or assigned to that of a province shall be entitled to receive such pension, gratuity, or other compensation as he would have received in like circumstances if the Union had not been established.

Tenure of office of existing officers.

144. Any officer of the public service of any of the Colonies at the establishment of the Union who is retained in the service of the Union or assigned to that of a province shall retain all his existing and accruing rights, and shall be entitled to retire from the service at the time at which he would have been entitled by law to retire, and on the

[1] The Act here followed the example of the practice of the Dominion and the Commonwealth.

pension or retiring allowance to which he would have been entitled by law in like circumstances if the Union had not been established.

Existing officers not to be dismissed for ignorance of English or Dutch.

145. The services of officers in the public service of any of the Colonies at the establishment of the Union shall not be dispensed with by reason of their want of knowledge of either the English or Dutch language.

Compensation to existing officers who are not retained.

146. Any permanent officer of the Legislature of any of the Colonies who is not retained in the service of the Union, or assigned to that of any province, and for whom no provision shall have been made by such Legislature, shall be entitled to such pension, gratuity, or compensation as Parliament may determine.

Administration of native affairs, &c.

147. The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council,[1] who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any colony for the purpose of reserves for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exerciseable by any such Governor or Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.

[1] Under the royal instructions the Governor of Natal was bound to act in native affairs on his personal discretion, after consultation with his Ministers, and a similar provision was implied in the provisions of the Transvaal and Orange River Colony Letters Patent of 1906 and 1907. Governors, however, found it impracticable to act independently of their Ministers with regard to native affairs; so that the Act has made a considerable change in the theory rather than the practice.

Devolution on Union of rights and obligations under conventions.

148.—(1) All rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment.

(2) The provisions of the railway agreement between the Governments of the Transvaal, the Cape of Good Hope, and Natal, dated the second of February, nineteen hundred and nine, shall, as far as practicable, be given effect to by the Government of the Union.[1]

IX.—New Provinces and Territories.

Alteration of boundaries of provinces.

149. Parliament may alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, on the petition of the provincial council of every province whose boundaries are affected thereby.

Power to admit into Union territories administered by British South Africa Company.

150. The King, with the advice of the Privy Council, may on addresses from the Houses of Parliament of the Union admit into the Union the territories administered by the British South Africa Company[2] on such terms and conditions as to representation and otherwise in each case as are expressed in the addresses and approved by the King, and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Power to transfer to Union government of native territories.

151. The King, with the advice of the Privy Council, may, on addresses from the Houses of Parliament of the Union, transfer to the Union the government of any territories, other than the territories administered by the British South Africa Company, belonging to or under the

[1] Under this agreement 30 per cent. of the Rand traffic was secured for Durban and 20 per cent. for the Cape ports. The rest of the traffic was secured for Delagoa Bay for a period of ten years by a treaty under which the Portuguese Government agreed to continue the granting of facilities in its possessions for the recruitment of native labour for the mines.

[2] Though Rhodesia must in time join the Union, there seem good reasons for its not so doing within the immediate future.

protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General in Council may undertake the government of such territory upon the terms and conditions embodied in the Schedule to this Act.[1]

X.—Amendment of Act.

Amendment of Act.

152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.[2]

[1] The Act here marks a considerable change of policy. Hitherto the High Commissioner has acted in his relations with the native territories independently of his responsible advisers. For the present, however, the Native Territories, comprising Basutoland, Bechuanaland Protectorate and Swaziland, notwithstanding the establishment of the Union, still remain under imperial control, and are administered by Resident Commissioners, under the direction of the Governor-General as High Commissioner, who legislates by means of Statutory Proclamations published in the Official Gazette. The inhabitants of these Territories were and to some extent still are very reluctant to come under the jurisdiction of the Union.

[2] The comparative simplicity with which an amendment of the Constitution can be made springs from the fact that South Africa is a union, not a federation.

Section 151.

SCHEDULE

1. After the transfer of the government of any territory belonging to or under the protection of His Majesty, the Governor-General in Council shall be the legislative authority, and may by proclamation make laws for the peace, order, and good government of such territory:[1] Provided that all such laws shall be laid before both Houses of Parliament within seven days after the issue of the proclamation or, if Parliament be not then sitting, within seven days after the beginning of the next session, and shall be effectual unless and until both Houses of Parliament shall by resolutions passed in the same session request the Governor-General in Council to repeal the same, in which case they shall be repealed by proclamation.

2. The Prime Minister shall be charged with the administration of any territory thus transferred, and he shall be advised in the general conduct of such administration by a commission consisting of not fewer than three members with a secretary, to be appointed by the Governor-General in Council, who shall take the instructions of the Prime Minister in conducting all correspondence relating to the territories, and shall also under the like control have custody of all official papers relating to the territories.

3. The members of the commission shall be appointed by the Governor-General in Council, and shall be entitled to hold office for a period of ten years, but such period may be extended to successive further terms of five years. They shall each be entitled to a fixed annual salary, which shall not be reduced during the continuance of their term of office, and they shall not be removed from office except upon addresses from both Houses of Parliament passed in the same session praying for such removal. They shall not be qualified

[1] See note on p. 285.

to become, or to be, members of either House of Parliament. One of the members of the commission shall be appointed by the Governor-General in Council as vice-chairman thereof. In case of the absence, illness, or other incapacity of any member of the commission, the Governor-General in Council may appoint some other fit and proper person to act during such absence, illness, or other incapacity.

4. It shall be the duty of the members of the commission to advise the Prime Minister upon all matters relating to the general conduct of the administration of, or the legislation for, the said territories. The Prime Minister, or another minister of State nominated by the Prime Minister to be his deputy for a fixed period, or, failing such nomination, the vice-chairman, shall preside at all meetings of the commission, and in case of an equality of votes shall have a casting vote. Two members of the commission shall form a quorum. In case the commission shall consist of four or more members, three of them shall form a quorum.

5. Any member of the commission who dissents from the decision of a majority shall be entitled to have the reasons for his dissent recorded in the minutes of the commission.

6. The members of the commission shall have access to all official papers concerning the territories, and they may deliberate on any matter relating thereto and tender their advice thereon to the Prime Minister.

7. Before coming to a decision on any matter relating either to the administration, other than routine, of the territories or to legislation therefor, the Prime Minister shall cause the papers relating to such matter to be deposited with the secretary to the commission, and shall convene a meeting of the commission for the purpose of obtaining its opinion on such matter.

8. Where it appears to the Prime Minister that the despatch of any communication or the making of any order is urgently required, the communication may be sent or order made, although it has not been submitted to a meet-

ing of the com ·ion or deposited for the perusal of the members there· ·n any such case the Prime Minister shall record the reasons for sending the communication or making the order and give notice thereof to every member.

9. If the Prime Minister does not accept a recommendation of the commission or proposes to take some action contrary to their advice, he shall state his views to the commission, who shall be at liberty to place on record the reasons in suppo of their recommendation or advice. This record shall be laid by the Prime Minister before the Governor-General in Council, whose decision in the matter shall be final.

10. When the recommendations of the commission have not been accepted by the Governor-General in Council, or action not in accordance with their advice has been taken by the Governor-General in Council, the Prime Minister, if thereto requested by the commission, shall lay the record of their dissent from the decision or action taken and of the reasons therefor before both Houses of Parliament, unless in any case the Governor-General in Council shall transmit to the commission a minute recording his opinion that the publication of such record and reasons would be gravely detrimental to the public interest.

11. The Governor-General in Council shall appoint a resident commissioner for each territory, who shall, in addition to such other duties as shall be imposed on him, prepare the annual estimates of revenue and expenditure for such territory, and forward the same to the secretary to the commission for the consideration of the commission and of the Prime Minister. A proclamation shall be issued by the Governor-General in Council, giving to the provisions for revenue and expenditure made in the estimates as finally approved by the Governor-General in Council the force of law.

12. There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported

into and consumed in the territories, and there shall be paid out of the Treasury annually towards the cost of administration of each territory a sum in respect of such duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average amount of the customs revenue of such territory for the three completed financial years last preceding the taking effect of this Act bore to the average amount of the whole customs revenue for all the Colonies and territories included in the Union received during the same period.

13. If the revenue of any territory for any financial year shall be insufficient to meet the expenditure thereof, any amount required to make good the deficiency may, with the approval of the Governor-General in Council, and on such terms and conditions and in such manner as with the like approval may be directed or prescribed, be advanced from the funds of any other territory. In default of any such arrangement, the amount required to make good any such deficiency shall be advanced by the Government of the Union. In case there shall be a surplus for any territory, such surplus shall in the first instance be devoted to the repayment of any sums previously advanced by any other territory or by the Union Government to make good any deficiency in the revenue of such territory.

14. It shall not be lawful to alienate any land in Basutoland or any land forming part of the native reserves in the Bechuanaland protectorate and Swaziland from the native tribes inhabiting those territories.

15. The sale of intoxicating liquor to natives shall be prohibited in the territories, and no provision giving facilities for introducing, obtaining, or possessing such liquor in any part of the territories less stringent than those existing at the time of transfer shall be allowed.

16. The custom, where it exists, of holding pitsos or

other recognised forms of native assembly shall be maintained in the territories.

17. No differential duties or imposts on the produce of the territories shall be levied. The laws of the Union relating to customs and excise shall be made to apply to the territories.

18. There shall be free intercourse for the inhabitants of the territories with the rest of South Africa subject to the laws, including the pass laws, of the Union.

19. Subject to the provisions of this Schedule, all revenues derived from any territory shall be expended for and on behalf of such territory: Provided that the Governor-General in Council may make special provision for the appropriation of a portion of such revenue as a contribution towards the cost of defence and other services performed by the Union for the benefit of the whole of South Africa, so, however, that that contribution shall not bear a higher proportion to the total cost of such services than that which the amount payable under paragraph 12 of this Schedule from the Treasury of the Union towards the cost of the administration of the territory bears to the total customs revenue of the Union on the average of the three years immediately preceding the year for which the contribution is made.

20. The King may disallow any law made by the Governor-General in Council by proclamation for any territory within one year from the date of the proclamation, and such disallowance on being made known by the Governor-General by proclamation shall annul the law from the day when the disallowance is so made known.

21. The members of the commission shall be entitled to such pensions or superannuation allowances as the Governor-General in Council shall by proclamation provide, and the salaries and pensions of such members and all other expenses of the commission shall be borne by the territories in the proportion of their respective revenues.

22. The rights as existing at the date of transfer of officers of the public service employed in any territory shall remain in force.

23. Where any appeal may by law be made to the King in Council from any court of the territories, such appeal shall, subject to the provisions of this Act, be made to the Appellate Division of the Supreme Court of South Africa.

24. The Commission shall prepare an annual report on the territories, which shall, when approved by the Governor-General in Council, be laid before both Houses of Parliament.

25. All bills to amend or alter the provisions of this Schedule shall be reserved for the signification of His Majesty's pleasure.

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The best account of its foundation is in John Winthrop's *History of New England*, 1643–9, vol. ii, new ed., Boston, 1853.

A good account of the New England Confederacy will be found in vol. i of Professor H. L. Osgood's *The American Colonies in the Seventeenth Century*. 1904.

See also R. Frothingham's *Rise of the Republic of the United States*. Boston, 6th ed., 1895.

The causes that led up to Penn's and Franklin's proposals for union are to be sought in the volumes of *The Calendar of State Papers, Colonial Series: America and West Indies*; and of *the Documents relating to the Colonial History of New York*. (See note on text of these papers.) Franklin's comments are in vol. iii of his *Works*, ed. by J. Sparks.

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For the gradual course of events which led up to confederation, in addition to the ordinary histories of Canada such constitutional authorities should be consulted as *Documents relating to the Constitutional History of Canada*, 1759–91, ed. by A. Shortt and A. G. Doughty, Ottawa, 1907; *Canadian Constitutional Development* (a collection of documents), ed. by H. E. Egerton and W. L. Grant, 1907; Lord Durham's *Report on Canada*, reissued 1902; and *Constitutional Documents of Canada*, ed. by W. Houston, Toronto, 1891. Joseph Howe's *Letters and Speeches* (new ed., Halifax, 1909) are of especial importance. Biographies also throw light on the subject, such as the 2nd vol. of Stuart Reid's *Life of Lord Durham*; *Lord Sydenham*, by A. Shortt (in the Makers of Canada Series), 1908; *Letters and Journals of Lord Elgin*, ed. by T. Walrond, 1873; *Baldwin, Lafontaine, Hincks*, by S. Leacock (in Makers of Canada Series), 1907; *Life and Speeches of George Brown*, by Alex. Mackenzie, 1882; *Memoirs of Sir John Macdonald*, by J. Pope, 2 vols., 1894, and *Sir John Macdonald*, by G. R. Parkin (in Makers of Canada Series), 1908. *The last*

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The books relating to the constitutional history of Australia are much less numerous and important than those relating to Canada; and the interest of the Commonwealth Statute itself is far greater than the interest of the events which preceded it.

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Committees of the Assemblies in Victoria and New South Wales, I have been greatly indebted to Mr. Allin's book, which covers ground not hitherto travelled.

Lord Grey's *The Colonial Policy of Lord John Russell's Administration*, 1853, should also be consulted.

To make up for the lack of earlier material, the Reports of the Conferences which preceded federation are very full and exhaustive. These are:—

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See also Keith, *op. cit.*, pp. 162–72.

See also 'Merchant Shipping Legislation in the Colonies', Article by Mr. A. B. Keith in *The Journal of Comparative Legislation*, 1909, p. 203.

The subject of South African Union is closely connected with the whole political past history of South Africa, and it seems unnecessary here to attempt a bibliography of this wider subject.

The names of the standard histories and books are generally familiar, and Parliamentary Papers are too numerous to specify.

For the immediate purpose it is only necessary to call attention to the powerful Memorandum 'On a Federation of the South African Colonies', issued under the auspices of Lord Selborne in 1907. [Cd. 3564.]

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Modern Constitutions, by W. F. Dodd, 1909, contains the fundamental laws of no less than twenty-two countries.

Though in some ways the British Constitution may have changed since Bagehot wrote his *English Constitution*, it is still of abiding value, especially in this connexion, for the comparison of Parliamentary with Presidential government. See also *The Governance of England*, by S. J. Low, 1904.

The standard works on the English Constitution are *The Law and Custom of the Constitution*, by Sir William R. Anson, 3 vols. (vol. i, Parliament; vols. ii and iii, The Crown), 3rd and 4th ed., 1909; *Introduction to the Study of the Law of the Constitution*, by A. V. Dicey, 7th ed., 1908; and *The Government of England*, by A. Lawrence Lowell, 2 vols., 1908.

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Oxford: Printed at the Clarendon Press by Horace Hart, M.A.